Q. ALL RIGHT. YOU IMMEDIATELY START DOING A U-TURN?
A. YES, SIR.
Q. BUT AT THE SAME TIME, YOU LOOK THROUGH YOUR REARVIEW MIRROR AND YOU SEE HIM RUNNING THE RED LIGHT?
A. WELL, AS YOU'RE DOING THE U-TURN, YOU CAN SEE THROUGH YOUR PERIPHERAL VISION THAT IT'S A RED LIGHT.
Q. AND HE WENT THROUGH THE LIGHT?
A. YES, SIR.
Q. AND HE DIDN'T ALMOST HIT ANYBODY, DID HE?
A. NO, SIR, HE DID NOT.
Q. YOU MAKE A U-TURN, YOUR CAMERA STARTED, AND YOU BEGAN TO FOLLOW HIM, CORRECT?
A. YES, SIR.
Q. AND YOUR SIREN IS ON?
A. YES, SIR.
Q. HOW LONG DID IT TAKE FOR HIM TO PULL OVER?
A. FROM THE FREEWAY ONRAMP LESS THAN A QUARTER MILE, I WOULD SAY. MAYBE 2000 FEET.
Q. I'M SORRY. I DON'T MEAN TO CUT YOU OFF. TIMEWISE, HOW LONG DID IT TAKE?
A. MAYBE 10 SECONDS OR LESS.
Q. OKAY. SO WITHIN 10 SECONDS OF YOU TURNING ON YOUR LIGHTS AND SIREN, HE PULLED OVER?
A. NO, 10 SECONDS FROM THE FREEWAY ENTRANCE.
Q. OKAY. FROM THE TIME YOU TURNED ON YOUR LIGHTS AND SIREN TO THE TIME YOU STOPPED HIM, HOW MUCH TIME EXPIRED?
A. I WOULD GUESS MAYBE APPROXIMATELY 15, PLUS OR MINUS.

Q. 15 SECONDS?

A. YES, SIR.

Q. OKAY. SO HE BASICALLY IMMEDIATELY COMPLIED WITH YOUR LIGHTS AND SIREN?

A. YES, SIR.

Q. AND DID YOU ACTUALLY EFFECTUATE THE ARREST?

A. YES, SIR, I DID.

Q. AND YOU HAD HIM GET OUT OF HIS CAR?

A. YES, SIR.

Q. DID HE ATTEMPT TO RUN OR STRUGGLE WITH YOU IN ANY TYPE OF WAY?

A. NO, SIR, HE DID NOT.

Q. DID HE COMPLY WITH YOUR ORDERS?

A. YES, SIR.

Q. FROM THE TIME YOU RECEIVED THE CALL ABOUT THE INCIDENT TO THE TIME HE WAS ARRESTED, DO YOU KNOW HOW MUCH TIME WENT BY?

A. I WOULD GUESSTIMATE ABOUT 4 MINUTES.

Q. OKAY. WHEN YOU WERE SPEAKING WITH HIM, WAS HE AGITATED OR UNRULY?

A. I WOULDN'T SAY HE WAS AGITATED. HE WAS A LITTLE, A LITTLE -- YEAH, A LITTLE AGITATED. A LITTLE ANGRY. A LITTLE UPSET.

Q. ANYTHING YOU'RE NOT USED TO FROM A TRAFFIC STOP?

A. NO.

MR. LINK: OBJECTION. RELEVANCE.

THE COURT: OVERRULED.

//

BY MR. GULLEY:

Q. ARE YOU FAMILIAR WITH THIS COMPLEX?

A. YES, I AM.

Q. HAD YOU EVER HAD ANY CONTACT WITH MR. CUNNINGHAM PRIOR TO THAT EVENING?

A. NO, SIR.

Q. SO YOU DON'T KNOW MR. CUNNINGHAM?

A. NO, I DO NOT.

Q. AND, AGAIN, IN REGARDS TO THE INCIDENT, HE JUST -- HE TOLD YOU HE JUST TOLD THESE PEOPLE NOT TO FUCK WITH HIM, CORRECT?

A. YES, SIR.

Q. AND HE ALSO SAID, "THOSE ARE THE SAME PEOPLE THAT TOOK MY CELL PHONE," CORRECT?

A. YES, SIR.

Q. HE NEVER TOLD YOU THAT HE POINTED THE GUN AT ANYBODY, CORRECT?

A. NO, SIR, HE DID NOT.

Q. HE NEVER TOLD YOU HE THREATENED ANYBODY WITH THE GUN?

A. NO, SIR.

MR. GULLEY: THANK YOU, YOUR HONOR. NOTHING FURTHER AT THIS TIME.

THE COURT: MR. LINK, ANYTHING FURTHER?

MR. LINK: NO, YOUR HONOR.

THE COURT: WOULD BOTH COUNSEL APPROACH, PLEASE.

(SIDEBAR CONFERENCE, NOT REPORTED.)

//

REDIRECT EXAMINATION

BY MR. LINK:

Q. I'M GOING TO SHOW YOU A VIDEO. IT IS MARKED AS PEOPLE'S 9. I ASKED YOU A FEW QUESTIONS ABOUT IT. WE ALREADY HAVE SEEN IT. I'M GOING TO PLAY IT THROUGH ONCE TO MAKE SURE THIS IS THE VIDEO WE'RE TALKING ABOUT AND THAT THIS IS INDEED THE VIDEO TAKEN FROM YOUR CAR.

THE WITNESS: THAT'S NOT MY VIDEO.

MR. LINK: THANK YOU. THAT WAS JUST TO LAY A FOUNDATION. NOTHING FURTHER.

THE COURT: ANY CROSS-EXAMINATION ON THAT, MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: THANK YOU, OFFICER. YOU CAN STEP DOWN.

MR. LINK, YOU MAY CALL YOUR NEXT WITNESS.

MR. LINK: THANK YOU, YOUR HONOR. THE PEOPLE CALL OFFICER CHASE TO THE STAND.

BRIAN CHASE,

HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. LINK:

Q. SIR, WOULD YOU PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD.

A. BRIAN CHASE, C-H-A-S-E.

Q. SIR, WHAT IS YOUR OCCUPATION?
A. I'M A POLICE OFFICER WITH THE CITY OF EL CAJON.
Q. AND HOW LONG HAVE YOU BEEN A POLICE OFFICER?
A. I'VE BEEN A POLICE OFFICER FOR 11 YEARS.
Q. I WANT TO TALK ABOUT SEPTEMBER 12TH, 2004. WERE YOU WORKING THAT NIGHT?
A. YES, I WAS.
Q. WERE YOU IN A UNIFORM?
A. YES, I WAS.
Q. A MARKED PATROL CAR?
A. YES.
Q. DID YOU RESPOND THAT EVENING TO A CALL OF A POTENTIAL ASSAULT?
A. YES, I DID.
Q. AND WHERE WERE YOU WHEN YOU RECEIVED THE CALL?
A. I BELIEVE I WAS AT BALLANTYNE AND PARK.
Q. AND THEN WHERE --
A. IN THE CITY OF EL CAJON.
Q. I'M SORRY.
A. IN THE CITY OF EL CAJON.
Q. AND ONCE YOU HEARD THE CALL, WHERE DID YOU GO?
A. I PROCEEDED EASTBOUND DOWN EAST MADISON AVENUE TOWARDS 545 NORTH MOLLISON WHERE THE INCIDENT HAD OCCURRED.
Q. OKAY. WHAT DID YOU DO?
A. AS I WAS APPROACHING THE INTERSECTION OF 545 NORTH MOLLISON, IT WAS PUT OUT OVER THE POLICE RADIO THAT THEY WERE BEHIND THE VEHICLE GETTING ONTO THE FREEWAY.
Q. SO YOU WEREN'T INVOLVED IN THE STOP, CORRECT?

A. I ARRIVED AFTER THE STOP WAS MADE AND ASSISTED.
Q. HAD THE DEFENDANT BEEN ARRESTED AT THAT TIME?
A. NO, HE HADN'T.
Q. WHAT DID THEY DO WITH THE DEFENDANT AT THAT TIME?
A. THEY PULLED HIM OUT OF THE VEHICLE, WHAT WE CALL A HIGH RISK STOP.
Q. WHERE DID THEY TAKE HIM?
A. HE WAS TAKEN TO THE EL CAJON POLICE DEPARTMENT.
Q. DID YOU HAVE AN OPPORTUNITY TO SPEAK WITH HIM?
A. YES, I DID.
Q. WHAT DID HE SAY TO YOU?
A. IF I COULD REFER TO MY REPORT WHICH I PREPARED THAT NIGHT FOR THE EXACT QUOTE?
Q. PLEASE.
A. THE TWO THINGS WHICH HE SAID TO ME WERE, QUOTE, "THAT BITCH KNOWS SHE STOLE THAT PHONE AND THEM CHECKS," END QUOTE. AND THE OTHER WAS, QUOTE, "I'M MAD BECAUSE I HAD TO GET RID OF MY STRAP," END QUOTE.
Q. AND YOU'VE BEEN AN OFFICER FOR 11 YEARS, YOU SAID?
A. YES.
Q. AND ARE YOU FAMILIAR WITH THE WORD "STRAP"?
A. YES, I AM.
Q. WHAT DO YOU TAKE THAT TO MEAN?
MR. GULLEY: OBJECTION. RELEVANCE.
THE COURT: OVERRULED.
BY MR. LINK:
Q. GO AHEAD.
A. I TAKE IT -- IT'S A SLANG WORD THAT'S USED FOR A

FIREARM.

MR. LINK: THANK YOU. NOTHING FURTHER.

THE COURT: CROSS-EXAMINE.

CROSS-EXAMINATION

BY MR. GULLEY:

Q. WHAT TIME WERE THOSE COMMENTS MADE?

A. SOME TIME AFTER HE GOT BACK TO THE PROCESSING STATION.

Q. AND WOULD THAT BE ROUGHLY AN HOUR AND A HALF TO TWO HOURS AFTER HE WAS ARRESTED?

A. NEGATIVE. I BELIEVE HE WAS ARRESTED SOMEWHERE A LITTLE AFTER 11 O'CLOCK.

Q. AND WHAT TIME WERE THOSE COMMENTS MADE?

A. SOME TIME BEFORE MIDNIGHT.

Q. SO ABOUT 45 MINUTES LATER?

A. YES, POSSIBLY.

Q. AND WHEN YOU SAID "PULLED HIM OUT OF THE VEHICLE," YOU DON'T MEAN HE WAS LITERALLY PULLED OUT OF THE VEHICLE, DID YOU?

A. NO. I'M SORRY. IF I SAID THAT, THAT'S NOT WHAT I MEANT.

Q. DID YOU ACTUALLY SEE THE ARREST?

A. YES, I DID. I SAID A HIGH RISK STOP WAS CONDUCTED.

Q. AND HE ACTUALLY CLIMBED OUT OF HIS VEHICLE BASED ON POLICE COMMANDS, CORRECT?

A. YES, HE DID.

Q. AND HE HAD HIS HANDS UP AND HE WALKED BACK TO THE POLICE CAR AS COMMANDED, CORRECT?

A. YES, HE DID.
Q. HE DIDN'T ATTEMPT TO FIGHT OR FLEE OR ANYTHING LIKE THAT, CORRECT?
A. NO, HE DID NOT.
Q. AND WERE YOU THE INVESTIGATING OFFICER ON THIS CASE?
A. YES, I WAS.
Q. ARE YOU THE ONE WHO SPOKE TO WITNESSES THAT EVENING?
A. YES.
Q. AND DID YOU SPEAK TO MR. CASTRO?
A. YES, I DID.
Q. DID YOU TAKE ANY PHOTOGRAPHS OF MR. CASTRO?
A. NO, I DID NOT.
Q. WHY NOT?
A. HE HAD NO VISIBLE INJURIES.
Q. OKAY. NOW, YOU HEARD MR. CASTRO TESTIFY THAT HE HAD A BIG RED MARK ON HIS NECK, CORRECT?
A. YES, I DID.
Q. YOU DID NOT SEE THAT MARK?
A. NO, I DID NOT.
Q. HAD YOU SEEN A MARK LIKE THAT WOULD YOU HAVE PHOTOGRAPHED IT?
A. YES, I WOULD HAVE.
Q. OKAY. AND DID MR. CASTRO EVER TELL YOU THAT HE WAS THROWN TO THE GROUND BY THE DEFENDANT?
A. NO, HE DID NOT.
MR. GULLEY: THANK YOU. NOTHING FURTHER, YOUR

HONOR.

THE COURT: REDIRECT.

REDIRECT EXAMINATION

BY MR. LINK:

Q. DID MR. CASTRO TELL YOU HE WAS THROWN UP AGAINST THE WALL?

A. HE TOLD ME HE WAS PUSHED UP AGAINST THE WALL WITH THE BARREL OF A SHOTGUN PLACED ON HIS NECK AND PUSHED ACROSS INTO THE WALL.

Q. AND WHEN YOU HAD AN OPPORTUNITY TO SPEAK WITH MR. CASTRO, HOW LONG AFTER WAS IT AFTER THE CALL WAS REPORTED?

A. PROBABLY 20, 25 MINUTES.

Q. SO YOU TALKED TO HIM 25 MINUTES AFTER THE CALL WENT THROUGH?

A. YES.

Q. YOU WENT TO HELP WITH THE STOP, CORRECT?

A. YES, I DID.

Q. AND THEN YOU WENT BACK TO THE APARTMENT COMPLEX?

A. YES, I DID.

Q. AND ROUGHLY 25 MINUTES PASSED?

A. ROUGHLY, YES.

Q. AND IN THAT TIME, AN INJURY OR RED MARK CAN GO DOWN BY THEN?

MR. GULLEY: OBJECTION. CALLS FOR --

THE COURT: SUSTAINED.

MR. LINK: NOTHING FURTHER.

THE COURT: MR. GULLEY, ANYTHING FURTHER?

RECROSS EXAMINATION

BY MR. GULLEY:

Q. WHEN HE TOLD YOU THAT INJURY, DID HE DESCRIBE HOW IT OCCURRED?

A. I'M SORRY?

Q. THE PUSHING OF HIS NECK, DID HE DESCRIBE HOW IT OCCURRED?

A. YES.

Q. DID HE SAY THE GUN WAS PARALLEL ACROSS HIS NECK OR PUSHED AGAINST HIS NECK?

A. PUSHED AGAINST HIS NECK WITH A BARREL.

Q. SO, AGAIN, YOU LOOKED FOR ANY TYPE OF EVIDENCE SHOWING THAT, CORRECT?

A. YES, I DID.

Q. AND YOU DIDN'T FIND ANYTHING?

A. NO, I DIDN'T.

MR. GULLEY: THANK YOU.

THE COURT: MR. LINK?

MR. LINK: NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU, OFFICER. YOU MAY STEP DOWN AND RESUME YOUR SEAT.

BY THE WAY, OFFICER CHASE IS THE INVESTIGATING OFFICER AND IS FREE TO REMAIN AS HE HAS BEEN THROUGHOUT MOST OF THE TRIAL.

MR. LINK, ANY ADDITIONAL WITNESSES?

MR. LINK: I DO, YOUR HONOR. MAY I HAVE ONE MINUTE TO CHECK OUTSIDE?

THE COURT: YES.

MR. LINK: THANK YOU.

YOUR HONOR, THE PEOPLE CALL NINA TALVERA TO THE STAND.

NINA TALVERA,

HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

MR. LINK: QUICK SIDEBAR, YOUR HONOR.

(SIDEBAR CONFERENCE, NOT REPORTED.)

DIRECT EXAMINATION

BY MR. LINK:

Q. COULD YOU PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD?

A. NINA TALVERA, N-I-N-A T-A-L-V-E-R-A.

Q. THANK YOU FOR COMING IN TODAY. I WANT TO ASK YOU A FEW QUESTIONS ABOUT AN INCIDENT THAT OCCURRED LAST YEAR, SEPTEMBER 12TH, 2004. DO YOU REMEMBER THAT DAY?

A. YES.

Q. ALL RIGHT. AND BACK IN SEPTEMBER, WHERE DID YOU LIVE?

A. BELLA VISTA APARTMENTS. IT'S 545 NORTH MOLLISON.

Q. OKAY. AND DO YOU STILL LIVE THERE?

A. YES.

Q. AND DID SOMETHING UNUSUAL HAPPEN THE NIGHT OF SEPTEMBER 12TH?

A. YES.

Q. ALL RIGHT. COULD YOU PLEASE TELL THE JURY WHAT

HAPPENED.

A. I WOKE UP TO A LOT OF YELLING AND SCREAMING AND CUSSING. AND I LOOKED OUT MY WINDOW, AND I SAW TWO OF THE RESIDENTS WERE GETTING INTO AN ALTERCATION.

Q. LET ME STOP YOU. DO YOU LIVE IN THE COMPLEX? YOU KNOW WHAT IT LOOKS LIKE?

I'M GOING TO SHOW YOU WHAT'S BEEN MARKED AS PEOPLE'S 1 FOR IDENTIFICATION. THIS PICTURE IS A, B AND C THERE. DO YOU RECOGNIZE THOSE THREE PICTURES FIRST OF ALL?

A. YEAH.

Q. WHAT DO YOU RECOGNIZE THOSE AS?

A. COMING IN THE APARTMENTS. IT'S THE BEGINNING OF THE APARTMENTS. THEN IT'S RIGHT WHERE THE ALTERCATION HAPPENED. AND THOSE ARE THE STAIRS UP FROM WHERE MOST OF IT -- WELL, YEAH, MOST OF IT HAPPENED. IT WAS ON THOSE STAIRS AND RIGHT OVER THERE.

Q. OKAY. IS THERE ANYWAY, WHATEVER'S THE BEST WAY TO DESCRIBE TO THE JURY, WHAT ANGLE OR VANTAGE POINT DID YOU HAVE?

A. RIGHT HERE. I WAS RIGHT ACROSS FROM THIS PICTURE RIGHT HERE.

Q. SO A LITTLE BIT FURTHER THIS WAY. SO YOU'RE POINTING AT PICTURE B, CORRECT?

A. YES.

Q. YOU'RE OVER HERE?

A. YEAH.

Q. ARE YOU ON THE GROUND LEVEL, OR ARE YOU ON THE SECOND STORY?

A. I'M ON THE GROUND LEVEL.

Q. HOW FAR WOULD YOU SAY YOU WERE FROM THIS ALTERCATION?

A. ABOUT AS FAR AS I AM FROM YOU NOW.

Q. OKAY. 20 FEET?

THE COURT: THAT'S GOING TO BE ABOUT 20 FEET.

BY MR. LINK:

Q. AND WHAT DID YOU SEE?

A. I SAW MR. CUNNINGHAM COMING DOWN THE STAIRS WITH SOMETHING IN HIS HAND, AND CHRIS WAS YELLING AT HIM, AND THEY WERE YELLING AT EACH OTHER. AND, THEN, WHEN MR. CUNNINGHAM WAS ON THE GROUND, HE HAD SOMETHING AT HIS SIDE. I COULDN'T TELL WHETHER IT WAS A BAT. IT LOOKS LIKE A BAT FROM WHERE I WAS. AND HE -- AND THEN CHRIS, MR. KNOX, TOLD HIM THAT HE IF HE CAME UP THERE AGAIN, HE WOULD KILL HIM. AND THEN CHRIS -- OR SORRY -- MR. CUNNINGHAM YELLED BACK AT HIM, AND HE RAISED THE -- WHAT I THOUGHT WAS A BAT -- IN THE AIR.

Q. OKAY. AND DID YOU TELL THE POLICE IT WAS EITHER A BAT OR SHOTGUN?

A. IT COULD HAVE BEEN EITHER ONE. IT COULD HAVE BEEN A BAT OR SHOTGUN. BUT FROM WHERE I WAS, IT LOOKED LIKE A BAT.

Q. BUT YOU TOLD THE POLICE --

A. YEAH.

Q. JUST LET ME FINISH. YOU TOLD THE POLICE IT COULD HAVE BEEN A BAT OR A SHOTGUN ?

A. YEAH.

Q. AND YOU SEE MR. CUNNINGHAM IN THE COURTROOM HERE

TODAY?
A. YES.
Q. AND HE IS RIGHT NEXT TO ME?
A. YES.
Q. TO MY RIGHT.
MR. LIN: NOTHING FURTHER.
THE COURT: JUST A MOMENT. MR. GULLEY GETS TO ASK YOU SOME QUESTIONS.

CROSS-EXAMINATION

BY MR. GULLEY:
Q. HI, MS. TALVERA.
A. HI.
Q. I GUESS YOU KNOW YOU'RE GOING TO HAVE TO COME BACK TOMORROW MORNING NOW, RIGHT?
A. THAT'S RIGHT.
Q. OKAY. DID YOU KNOW MR. CUNNINGHAM BEFORE THIS INCIDENT?
A. YES.
Q. AND HOW DID YOU KNOW HIM?
A. HE MADE A GATE FOR OUR THING SO THAT MY NEPHEW COULD PLAY OUT IN OUR PATIO.
Q. SO DID YOU HAVE ANY BAD CONTACT WITH HIM?
A. NO.
Q. WOULD YOU SAY THE CONTACTS YOU HAD WITH HIM WAS GOOD CONTACT?
A. YES.
Q. NOW, WHAT ABOUT MR. KNOX, DID YOU KNOW HIM?
A. YES.

Q. AND WHAT DID YOU KNOW ABOUT MR. KNOX?
A. HE WAS VERY MEAN AND YELLED AT MY MOM ALL THE TIME.
Q. AND YOUR MOM IS THE APARTMENT MANAGER?
A. YES.
Q. AND DID YOU ACTUALLY HEAR MR. KNOX YELL AT YOUR MOM ONE TIME?
A. YES.
Q. WOULD IT BE THREATENING?
A. NO, HE NEVER THREATENED HER. HE JUST YELLED AT HER AND CALLED HER A LOT OF NAMES.
Q. SIMILAR TO NAMES HE WAS SCREAMING THAT NIGHT, IF YOU CAN REMEMBER?
A. I DON'T RECALL ANY OF THE NAMES, BUT I DO RECALL THE THINGS HE WAS YELLING. BUT I DON'T RECALL ANY OF THE NAMES.
Q. OKAY. AND PRETTY BAD THINGS?
A. YES.
Q. WAS MR. CUNNINGHAM YELLING BACK OR WAS HE JUST CONTINUING WALKING AWAY?
A. HE WAS YELLING BACK.
Q. SAME TYPE OF THINGS?
A. YEAH, THEY WERE BOTH YELLING AT EACH OTHER.
Q. DID YOU EVER SEE -- WITHDRAW THAT.
YOU SAID YOU SAW MR. CUNNINGHAM RAISE THE ITEM IN THE AIR; IS THAT A YES?
A. YES. SORRY. YES.
Q. THAT'S OKAY. DID HE JUST POINT IT STRAIGHT UP?
A. YES.

Q. HE WASN'T NECESSARILY AIMING IT?
A. NO.
Q. HE JUST KEPT WALKING AWAY?
A. YES.
Q. DID YOU SEE MR. CASTRO -- OR DO YOU KNOW MR. CASTRO?
A. WAS HE THE ASIAN GUY THAT WAS WITH THEM?
Q. YES.
A. OKAY. WELL, I DON'T KNOW. I KNOW I SAW HIM DURING THE ALTERCATION. HE WAS STANDING AT THE TOP OF THE STAIRS YELLING.
Q. HE WAS ALSO YELLING?
A. YES.
Q. COULD YOU HEAR WHAT HE WAS YELLING?
A. NO, I COULDN'T HEAR THE VOICES. I COULD HEAR THEM, BUT I DON'T REMEMBER WHAT HE WAS YELLING.
Q. OKAY. WAS HE ACTUALLY OUTSIDE?
A. YES.
Q. NOW, WHAT ABOUT MRS. KNOW, DID YOU SEE HER?
A. YES.
Q. WAS SHE DOING THE SAME THING?
A. NO, SHE WAS JUST STANDING THERE.
Q. OKAY. SO THE TWO, MR. KNOX AND MR. CASTRO, WERE BOTH YELLING AT MR. CUNNINGHAM?
A. YES.
Q. AND MR. CUNNINGHAM WAS WALKING AWAY TOWARDS THE PARKING LOT?
A. HE WAS ALREADY IN THE PARKING LOT BECAUSE RIGHT

THERE IS A WHOLE PARKING LOT. HE WAS ALREADY IN THE PARKING LOT.

Q. DID YOU SEE HIM CONTINUE WALKING TOWARDS --

A. YES.

Q. DID YOU SEE MR. CUNNINGHAM AT ALL THAT DAY?

A. NO.

Q. AND, AGAIN, YOU NEVER HAD ANY PROBLEMS WITH MR. CUNNINGHAM?

A. NO.

Q. YOU THOUGHT HE WAS A NICE GUY?

A. YEAH, I'VE NEVER HAD ANY PROBLEMS WITH HIM AT ALL.

Q. THIS GATE THAT HE BUILT WAS FOR YOUR NEPHEW?

MR. LINK: OBJECTION. RELEVANCE.

THE COURT: SUSTAINED.

MR. GULLEY: THANK YOU. NOTHING FURTHER.

THE COURT: MR. LINK, REDIRECT?

REDIRECT EXAMINATION

BY MR. LINK:

Q. WHEN MR. KNOX WAS YELLING DOWN INTO THE PARKING LOT, WAS THE DEFENDANT YELLING BACK?

A. YES.

Q. AT SOME POINT, YOU SAID HE POINTED WHATEVER IT WAS, A BAT OR A SHOTGUN, TOWARDS MR. KNOX?

A. UP THAT WAY.

MR. GULLEY: OBJECTION.

THE WITNESS: UP IN THAT DIRECTION.

THE COURT: OVERRULED.

MR. LINK: THANK YOU. NOTHING FURTHER.

THE COURT: MR. GULLEY?

RECROSS EXAMINATION

BY MR. GULLEY:

Q. JUST TO CLARIFY THAT. YOU SAID HE POINTED UP IN THE AIR BUT NOT AT MR. KNOX?

A. NO, THIS WAY.

Q. AND THAT'S HOW -- YOU GOT YOUR HAND STRAIGHT UP IN THE AIR?

A. YEAH.

MR. GULLEY: THANK YOU.

MR. LINK: NOTHING FURTHER.

THE COURT: THANK YOU FOR YOUR TESTIMONY, MS. TALVERA. YOU'RE EXCUSED.

THE WITNESS: THANK YOU.

THE COURT: MR. LINK?

MR. LINK: I BELIEVE WE'LL NEED A BRIEF SIDEBAR.

(SIDEBAR CONFERENCE, NOT REPORTED.)

THE COURT: OKAY. WE'LL BE TAKING OUR SECOND RECESS OF THE AFTERNOON. I CAN ALMOST PROMISE NOW THAT THIS ONE IS GOING TO BE ON TIME. WE'LL BE 15 MINUTES. NO MORE THAN THAT. YOU'RE EXCUSED UNTIL 3:35. PLEASE REMEMBER NOT TO FORM OR EXPRESS OPINIONS OR DISCUSS EVIDENCE. AND WE'LL BE READY TO RESUME PROMPTLY AT 3:35, 15 MINUTES FROM NOW.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: OKAY. THE JURORS HAVE EXITED THE COURTROOM. EVERYONE ELSE IS PRESENT. WHAT'S UP?

MR. LINK: YES, I HAVE ANOTHER WITNESS. IT'S

ACTUALLY NINA'S MOTHER WHO IS THE MANAGER DOWN THERE. I PLAN TO ELICIT FROM HER THAT AT SOME POINT MR. CUNNINGHAM WAS ARRESTED AND HE NEVER CAME BACK TO HIS APARTMENT. I'M ACTUALLY GOING TO GET OUT THAT HE WAS ARRESTED, THAT HE NEVER CAME BACK TO HIS APARTMENT, AND, EVENTUALLY, SHE HAD TO RE-RENT IT, AND WHEN SHE DID THAT, SHE FOUND A COUPLE OF GUNS IN THERE, AND THAT SHE CALLED THE POLICE.

THE COURT: WHEN WAS THIS?

MR. LINK: THIS WAS --

THE COURT: WAS IT DAYS OR WEEKS AFTER?

MR. LINK: I WANT TO SAY A COUPLE WEEKS. LET ME GET THE EXACT TIME REAL QUICK, YOUR HONOR.

THE COURT: OKAY.

MR. LINK: OCTOBER 7TH OR SO, A GOOD THREE WEEKS.

THE COURT: OKAY. SO THE OFFER OF PROOF IS THAT THAT WITNESS IS THE MANAGER OF THE APARTMENT COMPLEX, THAT AFTER THE NIGHT IN QUESTION, MR. CUNNINGHAM NEVER CAME BACK, AND THAT SOME WEEKS LATER, SHE WENT INTO THE APARTMENT AND FOUND SOME GUNS?

MR. LINK: AND THEN CALLED THE POLICE.

THE COURT: AND THEN CALLED THE POLICE.

MR. LINK: AND THAT'S IT. I WON'T GET INTO ANYTHING ELSE, IF MR. GULLEY IS WORRIED ABOUT --

THE COURT: OKAY. WELL, LET'S FIND OUT IF MR. GULLEY IS WORRIED ABOUT ANYTHING.

MR. GULLEY: WELL, YOUR HONOR, THE DOOR IS SOMEWHAT OPEN WITH NINA TESTIFYING THAT SHE'S THE MANAGER. I THINK I HAVE TO GET INTO THE FACT OF WHAT THE KNOXES WERE EVICTED

FOR, DID MY CLIENT HAVE ANYTHING TO DO WITH THAT. AND, THEN, RE-OPEN THE DOOR OF MY CLIENT BEING IN CUSTODY BECAUSE SHE'S GOING TO SAY AFTER THAT NIGHT HE DIDN'T COME BACK TO THE APARTMENT. HE WAS GONE FOR THREE WEEKS, THEN SHE EVICTED HIM. SO YOU OPEN UP ANOTHER CAN OF WORMS.

THE COURT: WELL, THE FIRST CAN OF WORMS IS BEYOND THE SCOPE OF DIRECT EXAMINATION AND WOULD BE YOUR CHOICE TO CALL HER AS A WITNESS IF YOU FEEL IT'S RELEVANT. AS TO WHY THE KNOXES WERE GETTING EVICTED, WE HAVEN'T CROSSED THAT HURDLE YET, BUT WOULD NOT BE ALLOWED TO CROSS-EXAMINE HER ON THAT ISSUE SINCE IT WOULD BE BEYOND THE SCOPE OF THE OFFERED TESTIMONY.

THE SECOND THING WAS WHAT AGAIN, MR. GULLEY?

MR. GULLEY: YOUR HONOR, SHE'S GOING TO INDICATE THAT AFTER THAT NIGHT SHE DID NOT SEE MY CLIENT FOR APPROXIMATELY THREE WEEKS BEFORE SHE EVICTED HIM FROM THE APARTMENT AND THEN FOUND THESE GUNS.

THE COURT: OKAY. WELL, CERTAINLY THERE IS AN INFERENCE THAT HE WAS IN JAIL. BUT, YOU KNOW, THERE'S EVIDENCE BEFORE THIS JURY THAT HE WAS ARRESTED, AND IT WOULD NOT BE OVERLY PREJUDICIAL FOR THEM TO KNOW THAT HE WAS IN JAIL. IF HE WAS, THAT DOESN'T NEED TO BE SPECIFICALLY POINTED OUT. IT CAN IF YOU WISH. IT DOESN'T HAVE TO. BUT I DON'T SEE THE REASON TO PRECLUDE THE WITNESS FROM TESTIFYING THAT SHE FOUND THESE GUNS.

MR. LINK: THE ONLY WAY I CAN SEE SOLVING THIS ISSUE IS MAYBE COMING UP WITH A STIPULATION THAT THESE PARTICULAR GUNS, WHICH AN OFFICER WILL TESTIFY TO FROM

TAKING, HE'LL TESTIFY TO GETTING A CALL FROM DEBORAH TEICH THAT THERE ARE GUNS IN THIS PARTICULAR APARTMENT, AND THAT IT WAS NEVER RENTED.

THE COURT: YOU KNOW, IF THERE'S A STIPULATION -- IF THERE'S A STIPULATION, I'M NOT PART OF IT. I DON'T INTEND TO BE. BUT I DON'T SEE THAT THERE'S ANY PREJUDICE AT ALL TO THE DEFENDANT FOR THE OFFERED TESTIMONY. I MEAN, YOU GOT EVIDENCE THAT HE WAS ARRESTED. THERE'S NO REASON TO BELIEVE HE'S CURRENTLY IN CUSTODY. WE'RE DOING OUR BEST TO KEEP THEM FROM SEEING THAT HE IS. BUT EVEN IF THEY KNOW THAT HE'S IN CUSTODY NOW, THAT ALONE HAS BEEN FOUND NOT TO BE PREJUDICIAL AGAINST THE DEFENDANT FOR HIM TO BE IN CUSTODY, JUST THAT CHAINS OR HANDCUFFS NOT BE SHOWN TO THE JURY, OR THAT HE BE IN A STRIPED SUIT.

SO THE FACT THAT HE DIDN'T COME BACK, IF IT GIVES RISE TO AN INFERENCE THAT HE WASN'T ARRESTED, MY RESPONSE IS, SO WHAT?

MR. GULLEY: THEN, YOUR HONOR, I'M GOING TO ASK PERMISSION THEN, IN ORDER TO SAVE TIME, IN ORDER NOT TO DRAG HER BACK IN, IS TO GET A VERY LIMITED PART ABOUT CHRISTOPHER AND REBECCA, SPECIFICALLY THE PART WHERE HER DAUGHTER SAYS HE WAS THREATENED.

THE COURT: I'M SORRY? TO GET INTO WHAT?

MR. GULLEY: THE AREA WHERE HER DAUGHTER BROUGHT UP THAT HE WAS THREATENED BY MR. KNOX.

MR. LINK: AND I OBJECT TO THAT AS BEING RELEVANT.

THE COURT: I THOUGHT THE DAUGHTER SAID THAT HE NEVER THREATENED HER MOTHER, ONLY USED BAD LANGUAGE AND

ARGUED A LOT WITH HER.

MR. GULLEY: CORRECT.

THE COURT: OKAY.

MR. GULLEY: I'M SORRY. THE COURT'S UNAWARE OF THE 911 TAPE. THERE WAS ANOTHER 911 CALL MADE THAT NIGHT, AND THAT CALL WAS FROM MS. TEICH, AND SHE INDICATED --

THE COURT: MS. WHO?

MR. GULLEY: THE NEXT WITNESS.

THE COURT: THE MOTHER OF NINA?

MR. GULLEY: YES.

THE COURT: OKAY.

MR. GULLEY: SHE INDICATED THAT ON NUMEROUS OCCASIONS CHRISTOPHER KNOX HAD THREATENED HER AND OTHER PEOPLE IN THE COMPLEX.

THE COURT: SO NOW YOU -- WELL, WE'RE GETTING INTO, I SUPPOSE AT THIS POINT, CHARACTER WITNESS, OR CHARACTER EVIDENCE OF SOMEBODY WHO IS NOT EVEN A WITNESS AT THIS POINT. I'M NOT SURE IT'S RELEVANT TO ANYTHING. I MEAN, THE VICTIM IN THE CASE IS CASTRO, NOT KNOX. KNOX COULD, I SUPPOSE, POTENTIALLY BE CONSIDERED A VICTIM, BUT SO FAR HE HASN'T TESTIFIED. THE PEOPLE AREN'T GOING TO BE ALLOWED TO ARGUE THAT HE'S A VICTIM OF ANY OF THESE CRIMES. AND CHRISTOPHER, HIS PROPENSITY FOR VIOLENT THREATS OR CURSE WORDS, I'M NOT SURE IS RELEVANT TO ANY ISSUES.

MR. GULLEY: WELL, IT WOULD BE RELEVANT. BUT I'LL WITHDRAW.

THE COURT: OKAY.

MR. LINK: AND THEN AS A PROMISE, I WILL STICK TO

THE STRAIGHT AND NARROW OF WHAT I HAVE ALREADY OFFERED AS PROOF.

THE COURT: OKAY. SOUNDS OKAY TO ME.

IS MR. KNOX GOING TO BE A WITNESS?

MR. LINK: I'M NOT CALLING HIM, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT.

ANYTHING FURTHER AT THIS POINT, MR. LINK, OR MR. GULLEY?

MR. LINK: NO, SIR.

THE COURT: OKAY. WE'VE GOT 7 MINUTES OF THE BREAK THAT WE SHORTED OURSELVES ON LAST HOUR.

(RECESS.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: WE'RE ON THE RECORD. BOTH ATTORNEYS AND THE DEFENDANT ARE PRESENT. NO JURORS ARE PRESENT. WE'VE HAD SOME MISMARKING AND DOUBLE MARKING OF EXHIBITS. FIRST OF ALL, THE VIDEOTAPE FROM OFFICER PAZ'S CAR IS PEOPLE'S 8. IT'S PEOPLE'S 8. IT IS NOT PEOPLE'S 9. PLEASE MAKE A CHANGE, MADAME CLERK. PAZ'S CAR VIDEOTAPE, WHICH HAS BEEN REFERRED TO AS 9, IS PEOPLE'S 8.

ALSO, BY MISTAKE, THERE HAVE BEEN TWO PEOPLE'S 7'S REFERRED TO. IT WAS ORIGINALLY THE 911 TAPE, AND THEN IT WAS ALSO REFERRED TO AS THE VIDEOTAPE FROM ZMIJEWSKI'S CAR. THE 911 TAPE WILL BE RENUMBERED AS PEOPLE'S 9, NOT PEOPLE'S 7. AND THE ACTUAL PEOPLE'S 7 WILL REMAIN THE VIDEOTAPE FROM ZMIJEWSKI'S CAR.

SO TO REVIEW, PEOPLE'S 7 IS THE TAPE FROM ZMIJEWSKI'S CAR, PEOPLE'S 8 IS THE TAPE FROM PAZ'S CAR, AND PEOPLE'S 9 IS

THE 911 TAPE.

(PEOPLE'S EXHIBIT 7, VIDEOTAPE TAKEN FROM BRYAN ZMIJEWSKI'S VEHICLE, MARKED FOR IDENTIFICATION.)

(PEOPLE'S EXHIBIT 8, VIDEOTAPE TAKEN FROM STEPHEN PAZ'S CAR, MARKED FOR IDENTIFICATION.)

(PEOPLE'S EXHIBIT 9, TAPE OF 911 CALL, MARKED FOR IDENTIFICATION.)

MR. LINK: YES. AND FOR FURTHER CLARIFICATION, THE SHOTGUN SHELLS ARE 4. THERE'S THREE DIFFERENT GUNS, 5, 6 AND 3.

THE COURT: WELL, ONLY ONE GUN HAS BEEN REFERRED TO SO FAR.

MR. LINK: CORRECT.

THE COURT: AND THAT'S ALL I GO BY IS WHAT'S BEEN REFERRED TO, AND THAT'S PEOPLE'S 3, WITH THE SHOTGUN SHELLS AS PEOPLE'S 4.

OKAY. GO GET OUR JURORS PLEASE.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD IN THE MATTER OF THE PEOPLE VERSUS CUNNINGHAM. BOTH ATTORNEYS, THE DEFENDANT, AND ALL 14 JURORS ARE PRESENT. AND, MR. LINK, YOU MAY CALL YOUR NEXT WITNESS, AND THAT IS --

MR. LINK: DEBORAH TEICH.

THE COURT: OKAY.

DEBORAH TEICH,

HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE

WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. LINK:

Q. COULD YOU PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD.

A. DEBORAH TEICH, D-E-B-O-R-A-H T-E-I-C-H.

Q. AND WHERE DO YOU WORK?

A. AT BELLA VISTA APARTMENTS.

Q. AND WHERE ARE THOSE LOCATED?

A. AT 545 NORTH MOLLISON AVENUE.

Q. WHAT DO YOU DO THERE?

A. I'M THE PROPERTY MANAGER.

Q. WERE YOU WORKING AS A PROPERTY MANAGER BACK IN SEPTEMBER?

A. I WAS.

Q. AT SOME POINT, WAS JAMES CUNNINGHAM RENTING ONE OF YOUR APARTMENTS?

A. YES, HE WAS.

Q. AND WHICH ONE WAS THAT?

A. APARTMENT NUMBER 1.

Q. AND AT SOME POINT AFTER SEPTEMBER 12TH, DID HE LEAVE THAT APARTMENT?

A. HE DID.

Q. DID YOU EVENTUALLY HAVE TO RE-RENT THAT APARTMENT?

A. I DID.

Q. ROUGHLY HOW LONG AFTER MR. CUNNINGHAM LEFT THAT

APARTMENT DID YOU RE-RENT IT?

A. AROUND THE MIDDLE OF OCTOBER.

Q. OKAY. AND FROM THE TIME WHERE MR. CUNNINGHAM LEFT TO THE TIME YOU RE-RENTED IT, HAD ANYBODY ELSE STAYED IN THAT APARTMENT?

A. NO, THEY DID NOT.

Q. WHEN IT CAME TIME TO RE-RENT, DID YOU HAVE TO MOVE SOME ITEMS OUT OF THAT APARTMENT?

A. WE HAD TO FIRST GO THROUGH THE EVICTION PROCESS AND GET A LOCKOUT. THE SHERIFF CAME IN AND DID A LOCKOUT.

Q. OKAY. AT SOME POINT, DID YOU FIND SOMETHING THAT REQUIRED YOU TO CALL THE POLICE?

A. YES, I DID.

Q. WHAT DID YOU FIND?

A. A SHOTGUN IN THE CLOSET. TWO OF THEM.

Q. OKAY. DO YOU SEE MR. CUNNINGHAM HERE TODAY?

A. YES, I DO.

Q. COULD YOU PLEASE IDENTIFY WHERE HE'S SITTING AND IDENTIFY AN ARTICLE OF CLOTHING THAT HE'S WEARING.

A. HE'S THE DEFENDANT IN THE BLUE SHIRT, STRIPED SHIRT.

MR. LINK: IDENTIFYING THE DEFENDANT?

THE COURT: YES.

BY MR. LINK:

Q. I'M NOW SHOWING YOU WHAT'S BEEN MARKED AS PEOPLE'S 9 FOR IDENTIFICATION. I'M SHOWING IT TO DEFENSE COUNSEL. DO YOU RECOGNIZE THIS?

A. YES, I DO.

Q. AND WHAT DO YOU RECOGNIZE IT AS?
A. THE GUN THAT I FOUND IN THE CLOSET.
THE COURT: WHICH EXHIBIT IS IT AGAIN?
MR. LINK: THIS IS EXHIBIT NUMBER 6.
(PEOPLE'S EXHIBIT 6, WINCHESTER 22 CALIBER RIFLE WITH UNKNOWN SERIAL NUMBER, MARKED FOR IDENTIFICATION.)
THE COURT: OKAY. THANK YOU.
BY MR. LINK:
Q. THIS IS ONE OF THE TWO GUNS YOU FOUND?
A. YES, THAT'S CORRECT.
Q. IN THE CLOSET OF APARTMENT NUMBER 1?
A. THAT'S CORRECT, IN THE BEDROOM.
Q. THE BEDROOM?
A. YES, THAT'S CORRECT.
Q. WAS IT -- WERE THEY LAYING RIGHT ON TOP?
A. NO, THEY WERE LAYING UNDER SOME CLOTHES.
Q. ALL RIGHT. I'M NOW SHOWING YOU WHAT'S BEEN MARKED AS PEOPLE'S 5 FOR IDENTIFICATION. DO YOU RECOGNIZE THIS?
(PEOPLE'S EXHIBIT 5, STEVENS 20 CALIBER RIFLE WITH SERIAL NUMBER C816758, MARKED FOR IDENTIFICATION.)
A. YES, I DO.
Q. AND HOW DO YOU RECOGNIZE IT?
A. IT'S THE OTHER GUN THAT WAS IN THE CLOSET.
Q. AND THAT WAS FOUND RIGHT NEXT TO THIS?
A. THAT'S CORRECT.
MR. LINK: NOTHING FURTHER.
THE COURT: CROSS-EXAMINATION, MR. GULLEY.
//

CROSS-EXAMINATION

BY MR. GULLEY:

Q. ON SEPTEMBER THE 12TH, MR. CUNNINGHAM WAS NOT BEING EVICTED; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. THE EVICTION HAPPENED APPROXIMATELY THREE WEEKS AFTER SEPTEMBER THE 12TH?

A. THAT'S CORRECT.

Q. BECAUSE HE HAD NOT RETURNED TO HIS APARTMENT, CORRECT?

A. THAT'S CORRECT.

Q. OKAY. THESE ITEMS THAT YOU SAW IN THE CLOSET, COULD YOU TELL IF THEY WERE LOADED OR NOT?

A. IF THEY WERE NOT --

Q. LOADED?

A. NO, I DIDN'T. I COULDN'T. I CALLED THE POLICE AS SOON AS I SAW THE BUTT. I DIDN'T EVEN SEE THE WHOLE GUN UNTIL THE POLICE CAME.

Q. AND YOU SAW THIS WHEN YOU WERE TAKING ALL OF THE THINGS OUT OF HIS APARTMENT, CORRECT?

A. THAT'S CORRECT.

Q. AND THIS WAS UNDER SOME CLOTHES?

A. THAT'S CORRECT.

Q. SO IT WASN'T PROMINENTLY DISPLAYED IN THE LIVING ROOM?

A. NO, IT WAS NOT.

MR. GULLEY: OKAY. THANK YOU. NOTHING FURTHER.

THE COURT: REDIRECT?

MR. LINK: NOTHING.

THE COURT: ALL RIGHT. THANK YOU, MS. TEICH. YOU MAY STEP DOWN. YOU'RE EXCUSED.

MR. GULLEY: I'M SORRY, YOUR HONOR. I DO HAVE ANOTHER QUESTION. I'M SORRY, MA'AM.

THE WITNESS: THAT'S OKAY.

BY MR. GULLEY:

Q. HOW LONG DID MR. CUNNINGHAM RENT?

A. I'VE BEEN THERE SINCE FEBRUARY, SO I'M NOT EXACTLY SURE OF HIS MOVE-IN DATE. BUT I WOULD SAY PROBABLY ABOUT A YEAR AND A HALF PROBABLY.

Q. HE HAD BEEN LIVING IN THIS APARTMENT COMPLEX?

A. THAT'S CORRECT.

MR. GULLEY: ALL RIGHT. THANK YOU.

MR. LINK: NOTHING FURTHER.

THE COURT: ALL RIGHT. MR. LINK, I KNOW THAT YOUR NEXT WITNESS, YOU'VE ADVISED THE COURT, IS COMING FROM OUT OF TOWN AND HAS A FLAT TIRE. SO I'LL GIVE YOU AN OPPORTUNITY TO GIVE A QUICK CALL AND SEE IF THAT PERSON IS HERE.

MR. LINK: THE PEOPLE WILL REST.

THE COURT: YOU DON'T NEED THAT ONE?

MR. LINK: NO, YOUR HONOR.

THE COURT: ALL RIGHT. OKAY. DO YOU WANT TO INTRODUCE ANY OF YOUR EXHIBITS?

MR. LINK: BEFORE I REST, YOUR HONOR, I'D LIKE TO ENTER PEOPLE'S 1 THROUGH 9 INTO EVIDENCE AT THIS TIME.

THE COURT: OKAY. MR. GULLEY, IS THE DEFENSE GOING TO WANT TO BE HEARD ON ANY OF THE PEOPLE'S EXHIBITS.

MR. GULLEY: NO, YOUR HONOR.

THE COURT: OKAY. NOW, EXHIBITS 1 THROUGH 9 INCLUSIVE, MADAME CLERK -- IS THAT WHAT WE'RE TALKING ABOUT, ALL NINE HAVE BEEN REFERRED TO. ALL NINE ARE PEOPLE'S EXHIBITS. AND THOSE PEOPLE'S EXHIBITS ARE BEING INTRODUCED INTO EVIDENCE BY THE PEOPLE. NO OBJECTION FROM THE DEFENSE. THEY ARE RECEIVED.

NOW, BEFORE THE PEOPLE ACTUALLY REST, COULD I TALK TO COUNSEL AT SIDEBAR.

(PEOPLE'S EXHIBITS 1 THROUGH 9, RECEIVED IN EVIDENCE.)

(SIDEBAR CONFERENCE, NOT REPORTED.)

THE COURT: OKAY. TECHNICALLY, THE PEOPLE'S EXHIBITS ARE IN. BUT THERE IS -- THE PEOPLE HAVE ONE ADDITIONAL PIECE OF EVIDENCE THAT WILL BE INTRODUCED, APPARENTLY, FIRST THING IN THE MORNING. AND, THEREFORE, I'M GOING TO GO AHEAD AND CALL THE RECESS FOR THIS EVENING, LADIES AND GENTLEMEN. WE'RE GOING TO START UP AGAIN TOMORROW MORNING AT 9:15. WE ARE AHEAD OF SCHEDULE ON THE TRIAL. TOMORROW IS THURSDAY. I EXPECT THAT WE'RE GOING TO BE DONE PROBABLY BY NOON TOMORROW WITH ALL OF THE WITNESSES, PERHAPS BEFORE THAT, AND WE'LL HAVE LEGAL INSTRUCTIONS AND FINAL ARGUMENTS.

THERE WILL BE SOME DEFENSE EVIDENCE IN THIS CASE, I BELIEVE, AND, THEREFORE, I REMIND YOU OF THIS: PLEASE KEEP AN OPEN MIND. DON'T START FORMING OPINIONS ABOUT HOW YOU'RE GOING TO VOTE ON THE CASE UNTIL YOU'VE HEARD ALL OF THE EVIDENCE FROM BOTH SIDES. PLEASE DON'T CHAT ABOUT WHAT WENT

ON IN COURT TODAY WITH THE PEOPLE WITH WHOM YOU LIVE AT HOME. WE'LL RESUME TOMORROW MORNING AT 9:15 AGAIN. LEAVE YOUR NOTEBOOKS IN PLACE. HAVE A GOOD EVENING. WE'LL SEE YOU THEN.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: OKAY. THE JURY HAS EXITED. WHAT WE DID TALK ABOUT AT SIDEBAR WAS THE STIPULATION REGARDING THE DEFENDANT'S FELONY STATUS, WHICH WAS TO HAVE BEEN MR. GULLEY'S TASK, AND STILL IS. AND YOU'LL HAVE THAT READY TO PRESENT TO MR. LINK TOMORROW MORNING AT 9 O'CLOCK. WE'LL ALL BE HERE AT 9 O'CLOCK. THE JURY DOESN'T SHOW UP UNTIL 9:15, AND WE'LL GO FROM THERE.

MR. GULLEY: THAT'S FINE, YOUR HONOR.

THE COURT: ANYTHING FURTHER, GENTLEMEN?

MR. LINK: NO.

THE COURT: OKAY.

(AT 3:51 P.M. AN ADJOURNMENT WAS TAKEN TO RESUME ON THURSDAY, JANUARY 6, 2005, AT 9:00 A.M.)

- - -

(THIS PAGE DESIGNATED PAGE 188-200 FOR BLOCK-NUMBERING PURPOSES ONLY. PROCEEDINGS CONTINUE ON PAGE 201. NOTHING OMITTED.)

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAMES CUNNINGHAM

CASE NO. SCE243528

JANUARY 5, 2005

PAGES 17 -- 188-200

I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 3RD DAY OF JUNE, 2005.

IRENE PERKINS, CSR 12727
OFFICIAL COURT REPORTER

Evidence Memorandum

EL CAJON POLICE DEPARTMENT STATEMENT FORM

EXHIBIT

CASTRO STATEMENT

I

EL CAJON POLICE DEPARTMENT
STATEMENT FORM

PAGE: 1 EVIDENCE

CASE NO.: 04-015263 / 04-015265
REF. NO.: 193

TYPE OF INCIDENT: 245(a)(2) PC - ADW   DATE: 9-12-04

STATEMENT FORM FILLED OUT BY: VICTIM ☒ WITNESS ☐ SUSPECT ☐
IF TRAFFIC ACCIDENT: PEDESTRIAN ☐ VEHICLE DRIVER ☐ VEHICLE PASSENGER ☐ WITNESS ☐

NAME: Jose Castro (LAST, FIRST, MIDDLE)   DOB: 10-11-48   RACE: Gm Guam   SEX: M

ADDRESS: 1325 E/Cadon (CITY STATE ZIP)   PHONE #: (619 3286788 (HOME), ( ) (CELL PHONE / PAGER)

ID TYPE: ____   ID #: N9172292

EMPLOYED BY: Disabled (BUSINESS NAME)   ADDRESS: ____ (CITY STATE ZIP)

BUSINESS PHONE #: ( )   DAYS OFF: ____   WORK HOURS: ____

I Return the vacuum time 4:30 PM
~~to~~ And I put on is DHAO and
went back upstair he came in
to the house with the Gun
and him said were is my
sellphone ~~on~~ i dont know what
are you talking About they
he put the Gun on my
neck and he push me to
the wall with the Gun
on my neck then he said
is going to kill me if I
dont Return to me the Gun
Look like Rifle short brown
Largh Barral Gun

SIGNED: [signature]   DATE: 9/12/04   TIME am / pm 23:40   OFFICER: D CHASE

PD-9-00

EVIDENCE MEMORANDUM

EXHIBIT

"J"

Probation Hearing

&

SENTENCING

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

EAST COUNTY DIVISION

DEPARTMENT 9 BEFORE HON. WILLIAM J. MCGRATH

PEOPLE OF THE STATE OF CALIFORNIA,)
)
)
PLAINTIFF,) NO. SCE243538
VS.)
) PROBATION HEARING AND
JAMES CUNNINGHAM,) SENTENCING
)
DEFENDANT.)
)

REPORTER'S TRANSCRIPT

WEDNESDAY, MARCH 9, 2005

APPEARANCES:

FOR PLAINTIFF: BONNIE DUMANIS
DISTRICT ATTORNEY'S OFFICE
BY: DANIEL F. LINK, ESQ.
330 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101

FOR DEFENDANT: OFFICE OF THE PUBLIC DEFENDER
BY: STACEY D. GULLEY, ESQ.
250 EAST MAIN STREET, 6TH FLOOR
EL CAJON, CALIFORNIA 92020

TAMELA ERVIN, RPR, CSR NO. 9685
PRO TEM REPORTER
EL CAJON, CALIFORNIA

SAN DIEGO, CALIFORNIA; WEDNESDAY, MARCH 9, 2005; P.M. SESSION

THE COURT: WE'RE ON THE RECORD IN THE MATTER OF PEOPLE VERSUS JAMES CUNNINGHAM. CASE NUMBER SCE243538.

APPEARANCES, PLEASE.

MR. LINK: DANIEL LINK, FOR THE PEOPLE.

MR. GULLEY: STACY GULLEY, PUBLIC DEFENDER, ON BEHALF OF MR. CUNNINGHAM, WHO IS ALSO PRESENT IN COURT AND IN CUSTODY.

THE COURT: IN THIS CASE, TODAY HAS BEEN SET AS THE DATE FOR THE PROBATION HEARING AND SENTENCING.

MR. GULLEY, DOES MR. CUNNINGHAM WAIVE ARRAIGNMENT FOR JUDGEMENT AND SENTENCING?

MR. GULLEY: SO WAIVED.

THE COURT: IS THERE ANY LEGAL REASON WHY JUDGEMENT SHOULD NOT BE IMPOSED?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: I'M IN RECEIPT OF AND HAVE READ AND CONSIDERED THE FOLLOWING: A PROBATION REPORT -- AND WHO'S HERE TODAY FOR PROBATION?

PROBATION OFFICER: BETH MARDER, M-A-R-D-E-R.

THE COURT: I READ AND CONSIDERED, ON TWO DIFFERENT OCCASIONS, THE FOURTEEN-PAGE PROBATION REPORT, WHICH WAS FILED ON JANUARY 31ST. I'VE READ AND CONSIDERED, ALSO TWICE, THE LAST TIME BEING ABOUT TWO HOURS AGO, THE STATEMENT IN MITIGATION AND IN SUPPORT OF PROBATION, ALONG WITH THE ATTACHMENTS CONTAINED THEREIN OF LETTERS FROM DEFENDANT'S MOTHER, A BROTHER, I BELIEVE, AND OTHER SUPPORTERS.

EARLIER THIS AFTERNOON, I WAS HANDED ADDITIONAL

LETTERS ON BEHALF OF MR. CUNNINGHAM, WHICH I HAVE NOT HAD A CHANCE TO READ AND WHICH I WILL NOW TAKE THE TIME TO READ AND THEREFORE WILL BE, I GUESS, IN RECESS, ALTHOUGH I WON'T LEAVE THE BENCH, FOR ABOUT THREE TO FIVE MINUTES.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. THE COURT HAS ALSO NOW READ THE THREE-PAGE LETTER FROM MR. CUNNINGHAM, A LETTER DATED MARCH 2ND, FROM A ROBERT TAMBUZI, T-A-M-B-U-Z-I, WHO STATED, I BELIEVE, HE WAS A SIBLING AND HAD BEEN -- HAD SAT THROUGH THE TRIAL. THE LETTER FROM GREGORY CUNNINGHAM, A LETTER FROM ELLA ALSLEY, A-L-S-L-E-Y, A LETTER FROM SHARON WHITE AND A LETTER FROM A LA DANTE, L-A CAPITAL D-A-N-T-E, CUNNINGHAM. I'VE READ THOSE LETTERS, AS WELL AS, AS I SAID, THE PROBATION REPORT AND THE ATTACHMENTS THERETO, AS WELL AS THE STATEMENT OF MITIGATION.

I'M AWARE OF THE FACTS OF THIS CASE, HAVING PRESIDED OVER THE JURY TRIAL SOME MONTHS BACK, AND WILL BE HAPPY TO HEAR ANY ARGUMENT FROM BOTH SIDES.

FIRST, MR. GULLEY.

MR. GULLEY: THANK YOU, YOUR HONOR. FIRST, I'D LIKE TO ASK MS. ROBBINS -- SHERRY ROBBINS TO COME UP. MS. ROBBINS IS THE LADY WHO WAS GOING TO TESTIFY AT THE HEARING, BUT SHE HAD CAR PROBLEMS THAT MORNING. THE COURT ISSUED A WARRANT FOR HER ARREST. I'D ASK IF THE WARRANT CAN BE RECALLED NOW. AND MS. ROBBINS WOULD LIKE TO ADDRESS THE COURT ABOUT WHAT SHE WOULD HAVE TESTIFIED TO. A STATEMENT SHE HAD, LIKE, TO GIVE ON MR. CUNNINGHAM'S BEHALF.

THE COURT: ALL RIGHT. THE EXISTING WITNESS BENCH WARRANT FOR THE ARREST OF SHERRY ROBBINS IS RECALLED.

AND, MA'AM, IF YOU'LL STEP UP -- ACTUALLY, WHY DON'T YOU DO THIS. WHY DON'T YOU HAVE A SEAT IN THE FIRST ROW THERE, RIGHT ON THE END. RIGHT THERE. AND START BY TELLING US YOUR NAME, SPELLING YOUR LAST NAME, FOR THE RECORD.

MS. ROBBINS: MY NAME IS SHERRY ROBBINS. SHERRY, S-H-E-R-R-Y, ROBBINS, R-O-B-B-I-N-S. I'M THE SECURITY OFFICER ON THE PROPERTY THERE WHERE MR. CUNNINGHAM LIVES.

THE COURT: EVERYTHING YOU SAY HAS TO BE HEARD BY THE 30 OR SO PEOPLE IN THIS COURTROOM, AND THERE'S NO MICROPHONE. THIS COURT REPORTER HAS TO PICK UP EVERYTHING THAT YOU SAY. SO TRY TO SPEAK LOUDLY AND CLEARLY SO WE CAN ALL HEAR YOU.

MS. ROBBINS: YES, SIR.

I'M THE SECURITY OFFICER ON THE PROPERTY WHERE MR. CUNNINGHAM LIVED. I DIDN'T KNOW JAMES VERY WELL, BUT WHAT I DID KNOW WAS IF I NEEDED ANY HELP WITH ANYTHING TO SECURE THE PROPERTY, JAMES WAS THERE. AND WITH SIGNS, GATES, HELPED A LOT OF THE PEOPLE THERE. MANY TIMES I KNOW MR. CUNNINGHAM WOULD LEND MONEY TO KIDS IF THEY WERE OUT OF FOOD OR SOMETHING LIKE THAT. JAMES WAS REAL GOOD TO LEND IT -- WELL, ACTUALLY HE WOULD LEND IT. THERE WAS A TIME I KNOW HE WAS UPSET. THE MONEY HE HAD GIVEN THE RESIDENTS ABOVE WASN'T USED FOR THE CHILD. IT WAS USED FOR DRUGS. SO THERE WAS A -- I KNEW THAT HE WAS -- HE MEANT WELL.

AND, IN FACT, I WAS VERY IGNORANT TO WHAT KIND OF PROPERTY I WAS GOING INTO WHEN I STARTED THAT JOB THERE. AND THE KIDS THERE WERE NOT -- NONE OF US WERE PREPARED FOR IT. A LOT OF GANG AFFILIATES, WITH GUN SHOOTINGS. AND MY FIRST WEEK THERE, THERE WAS AN INCIDENT WITH ME AND ANOTHER MALE. AND I

WAS MAKING ROUNDS ONE NIGHT AND COME AROUND AND SEE MR. CUNNINGHAM AT THE FRONT OF THE GATE, WORKING ON HIS VEHICLE, AND I WAS TALKING TO HIM. I REALIZED HE HAD SPOKE TO SOME -- HE HAD SAID NO, LITTLE HOMEY OR NO, HOMEY. AND I REALIZED HE WAS SPEAKING TO SOMEONE JUST DIRECTLY BEHIND ME.

AND WHEN I LOOKED BACK, IT WAS THE SAME KID I HAD HAD AN ARGUMENT OR PUT OFF MY PROPERTY THAT NIGHT WHO HAD THREATENED TO SHOOT ME. SO I DON'T KNOW, BUT I THINK MR. CUNNINGHAM HELPED ME NOT BE PHYSICALLY ASSAULTED THAT NIGHT. AND BECAUSE THESE BOYS THINK THEY -- I'M PRETTY SURE THEY ALL HAVE AN UNDERSTANDING FOR EACH OTHER AND THEY LISTEN TO HIM. I KNOW THERE WAS RESPECT FOR HIM FROM A LOT OF KIDS ON THE PROPERTY, WHETHER THEY WERE GANG-AFFILIATED OR KIDS THAT JUST LIVED ON THE PROPERTY.

SO THAT'S PRETTY MUCH ALL I CAN TESTIFY TO BECAUSE I NEVER HAD A PROBLEM WITH MR. CUNNINGHAM. HE WAS VERY HELPFUL WITH ANYTHING I NEEDED ON THE PROPERTY, NEVER SHOWED ANY DISRESPECT. AND APOLOGIZED IF HE WAS BEING TOO LOUD. AND I NEVER HAD TO ASK HIM TO GO IN AFTER CURFEW. I WAS ACTUALLY QUITE SURPRISED BY ALL THIS. MY OPINION OF HIM AND WHAT I HAD TO DEAL WITH HIM. I NEVER HAD A PROBLEM WITH HIM.

THE COURT: MS. ROBBINS, THANK YOU FOR YOUR COMMENTS. YOU'RE EXCUSED AT THIS POINT. I'LL JUST TELL YOU PRIOR TO YOUR LEAVING THAT THE NEXT TIME YOU GET A COURT SUBPOENA, TO APPEAR IN COURT. YOU RUN THE RISK OF GETTING ARRESTED, IF YOU HAVE A CAR BREAK DOWN AND YOU CAN'T MAKE IT AND DON'T CALL ANYBODY OR TELL ANYBODY ABOUT IT.

MS. ROBBINS: I UNDERSTAND. I DIDN'T REALIZE IT WAS A

SUBPOENA, EITHER.

THE COURT: THANK YOU. YOU'RE EXCUSED.

MR. GULLEY: THANK YOU.

THE COURT: MR. GULLEY.

MR. GULLEY: YES, YOUR HONOR. THE QUESTION NOW, YOUR HONOR, IS HOW'S MR. CUNNINGHAM, BASED ON THE JURY'S FINDINGS, GOING TO BE PUNISHED? DOES THE COURT PUNISH HIM -- IF THE COURT IMPOSES TEN YEARS, FOURTEEN YEARS RECOMMENDED BY PROBATION, IS THAT SEVERE PUNISHMENT FOR WHAT HAPPENED IN THIS CASE? AND I SUBMIT TO THE COURT IT IS. AND I'M SURE THE PEOPLE WILL SAY TO GIVE HIM PROBATION IS UNDERPUNISHMENT. SO THE COURT HAS A DIFFICULT CALL TO MAKE.

BASED ON THE LETTERS, BASED ON MY STATEMENT OF MITIGATION, WHICH I WON'T REPEAT IN DETAIL, BASED ON WHAT THIS COURT HAS SEEN IN TRIAL, I THINK THE BIGGEST TRAGEDY COULD BE SENDING HIM TO PRISON FOR THAT PERIOD OF TIME.

IF THE COURT'S HANDS WEREN'T TIED, I WOULD THINK APPROPRIATE PUNISHMENT WOULD BE TWO OR THREE YEARS IN STATE PRISON. AND THAT'S BASED ON MY EXPERIENCE OF DOING CRIMINAL LAW FOR 20 YEARS. FOURTEEN YEARS, TEN YEARS IS WAY TOO MUCH TIME FOR WHAT HAPPENED IN THIS CASE, CONSIDERING NO ONE WAS HURT. NOT PHYSICALLY. NOT MENTALLY. THIS WAS SOMETHING THAT FIVE MINUTES OF MR. CUNNINGHAM'S LIFE GOT OUT OF CONTROL AND HE MADE A BAD DECISION. FOURTEEN YEARS IS NOT AN APPROPRIATE SENTENCE FOR FIVE MINUTES OF BAD DECISION, WHEN NO ONE IS HURT.

NOW, IF SOMEBODY GOT HURT, SHOT, KILLED, THEN THERE'S NO ARGUMENT ON THAT POINT. BUT HERE WE HAVE A GUY WHO, FOR THE LAST TEN YEARS, HAS BEEN LAW-ABIDING, EXCEPT FOR SOME

MINOR TRAFFIC STUFF, WHO'S BEEN WORKING, WHO'S BEEN RAISING A DAUGHTER, WHO HAS STRONG FAMILY SUPPORT, WHO'S BEEN TRYING TO DO ALL THE RIGHT THINGS. THE MAIN MISTAKE HE MADE WAS TAKING THE LAW INTO HIS OWN HANDS. AND FOR THAT FIVE-TO-TEN-MINUTE PERIOD OF TIME, HE WAS WRONG. BUT IT DOES NOT JUSTIFY FOURTEEN YEARS IN STATE PRISON OR EVEN TEN YEARS IN STATE PRISON.

I'M ASKING THE COURT TO TAKE A BOLD MOVE. I'M ASKING THE COURT TO GRANT HIM PROBATION ON THIS CASE. THEREFORE, ALL THE OTHER STUFF WON'T KICK IN. I'M ASKING THE COURT TO STRIKE THE STRIKE. GRANT HIM PROBATION. STAY TEN YEARS, IF THAT'S WHAT THE COURT WISHES TO DO.

IF THE COURT NEEDS ANY OTHER INPUT, THEN THE SECOND ALTERNATIVE I WOULD GIVE TO THE COURT IS TO SEND HIM UP ON 1203 EVALUATION. LET THEM LOOK AT HIM. LET THEM SEE WHAT TYPE OF GUY HE IS. AND THEN HAVE THEIR INPUT FOR SENTENCING.

THE COURT: ALL RIGHT. THANK YOU.

MR. LINK.

MR. LINK: YES, YOUR HONOR. AS YOUR HONOR KNOWS, THE DEFENDANT IS INELIGIBLE FOR PROBATION. THERE DON'T APPEAR TO BE ANY CIRCUMSTANCES IN THIS CASE THAT ARE OVERLY MITIGATED.

LOOKING AT THE DEFENSE BRIEF THAT WAS FILED, NONE OF THE SIX CIRCUMSTANCES OF MITIGATION ARE ANYWHERE CLOSE TO CONVINCING.

THE DEFENDANT'S PERFORMANCE ON PROBATION. HE VIOLATED PROBATION, JUST BASED ON THE REPORT FILED BY THE PROBATION OFFICE, A MULTIPLE OF SEVEN OR EIGHT TIMES. MOSTLY COMMITTED FOR CREATING 14601 VIOLATIONS.

SOME PEOPLE WOULD CONSIDER HIS CRIMINAL -- IT'S NOT

INSIGNIFICANT. THERE IS A CRIMINAL RECORD THERE, OBVIOUSLY, WITH A STRIKE. STARTING BACK IN '76. AND HE HAS SHOWN A PATTERN OF VIOLENCE. HE HAD -- WHICH WAS INITIALLY STARTED OUT WITH ASSAULT WITH A DEADLY WEAPON OF A POLICE OFFICER 29 YEARS AGO. PLEADING TO A PC69. AND NOT TOO LONG AFTER '80, WE SEE MORE VIOLENCE, WITH BATTERY. AND THEN '83, HE HAS A STRIKE. THE ROBBERY. THERE'S A HIT AND RUN IN '93. TEN YEARS LATER. THERE'S FELON IN POSSESSION OF FIREARM IN 1993.

UNFORTUNATELY, THERE'S RARELY -- HE CONTINUES TO SHOW A PATTERN OF CRIMINAL CONDUCT, SOME OF WHICH IS VIOLENT.

SO TAKING A BOLD STEP AND GRANTING THIS DEFENDANT PROBATION IS JUST NOT APPROPRIATE, NOR IS GIVING HIM A DIAGNOSTIC EVALUATION FOR THREE MONTHS.

THE DEFENDANT, BECAUSE OF THE CRIMES HE'S COMMITTED OVER THE LAST 29 YEARS, IS WELL AWARE THAT HE SHOULD NOT -- NO MATTER WHAT THE CIRCUMSTANCES HE'S LIVING IN, SHOULD NOT HAVE GUNS IN HIS HOUSE, NOR SHOULD HE BE ARMING HIMSELF AND ASSAULTING PEOPLE WITH THEM. THAT CAN'T BE FORGOTTEN, EITHER, YOUR HONOR. THIS -- WE'RE DEALING WITH A GUN. AND AS YOUR HONOR KNOWS, LAWS GET VERY HARSH AS SOON AS GUNS GET INVOLVED. AND THERE'S GOOD REASON FOR THAT. THERE'S NO REASON THIS DEFENDANT SHOULD BE ANYWHERE NEAR A GUN, LET ALONE POSSESSING THREE OF THEM, TWO OF WHICH WAS MODIFIED AND ONE WHICH WAS USED -- PLACED TO THE NECK OF A FAIRLY HELPLESS VICTIM.

I THINK THAT THE PROBATION RECOMMENDATION IS APPROPRIATE.

THE COURT: ANYTHING FURTHER, MR. GULLEY?

MR. GULLEY: AGAIN, YOUR HONOR, I UNDERSTAND WHAT THE

PEOPLE ARE SAYING. OKAY. MAYBE PROBATION MAY BE AN UNDERPUNISHMENT, BUT I HAVEN'T SEEN ANYTHING THE PEOPLE HAVE SHOWN IN THIS CASE WHERE TEN YEARS, FOURTEEN YEARS IS AN APPROPRIATE PUNISHMENT.

AND, AGAIN, THE QUESTION IS: DO YOU PUNISH HIM TOO HARD BASED UPON THE FACTS OF THIS CASE, OR DO YOU PUNISH HIM -- HE HAS SHOWN STINTS IN HIS LIFE WHERE HE CAN BE AN EXCELLENT CITIZEN. TEN YEARS SINCE HIS LAST FELONY, TEN YEARS BEFORE THAT -- BEFORE HIS ROBBERY. HE HAS FAMILY SUPPORT. I DON'T KNOW HOW MUCH MORE WE CAN ASK OF A PERSON. PEOPLE MAKE MISTAKES. HE MADE A BIG ONE. THE QUESTION IS: IS THAT MISTAKE WORTH TEN YEARS? I SUGGEST IT'S NOT.

I BELIEVE HIS MOTHER WOULD LIKE TO ADDRESS THE COURT.

THE COURT: I'LL HEAR FROM HIS MOTHER BRIEFLY. HIS MOTHER DID WRITE ME A LETTER, WHICH I DID READ. AND IF YOU HAVE ANYTHING FURTHER YOU WOULD LIKE TO SAY, YOU CAN STEP FORWARD.

DEFENDANT'S MOTHER: I WOULD JUST LIKE TO SAY I FEEL THAT JAMES SHOULD BE GIVEN A CHANCE. HE HAS TWO CHILDREN. ONE 11. AND SHE DOESN'T KNOW WHERE HE IS. SHE THINKS HE'S WORKING OUT OF TOWN. SHE THINKS HE'S WORKING OUT OF TOWN. AND I KNOW I'M GOING TO HAVE TO TELL HER THE OUTCOME OF TODAY, BUT I'M JUST ASKING YOU TO GIVE HIM LENIENCY BECAUSE I'M 65, WITH POOR HEALTH. AND IF HE'S GONE FOR FOURTEEN YEARS, I MAY NEVER SEE HIM AGAIN. THANK YOU.

THE COURT: IS THERE A CUSTODY UPDATE FROM PROBATION?

PROBATION OFFICER: YES, THERE IS, YOUR HONOR.

178, 26 CREDITS, 204 TOTAL.

THE COURT: YOU KNOW, I'M SORRY. I ASKED FOR THAT INFORMATION, BUT THEN I WAS NOT PREPARED TO RECEIVE IT.

ONE MORE TIME, PLEASE.

PROBATION OFFICER: 178, 26 CREDIT, 204 TOTAL.

THE COURT: THANK YOU.

THIS CASE IS A VERY POIGNANT EXAMPLE OF THE DIFFICULTY THAT WE JUDGES FACE WHEN THE PEOPLE AND THE LEGISLATURE DECIDE THAT CERTAIN SENTENCES SHOULD BE MANDATORY AND SHOULD APPLY TO ALL PEOPLE UNDER CERTAIN CIRCUMSTANCES. EVERY CASE IS DIFFERENT. EVERY PERSON IS DIFFERENT. AND IT IS DECEPTIVELY EASY FOR THE PEOPLE WHO MAKE OUR LAWS TO BELIEVE THAT THE ONE-SIZE-FITS-ALL SENTENCING SCHEME AND/OR MANDATORY SENTENCES FOR CERTAIN CRIMES UNDER CERTAIN CIRCUMSTANCES SHOULD BE THE LAW OF THE LAND.

MR. CUNNINGHAM'S SITUATION IS, ACCORDING TO THE LAW, TO EITHER RECEIVE PROBATION WITH LOCAL JAIL TIME, TO RECEIVE TEN YEARS IN PRISON, TWELVE YEARS IN PRISON OR FOURTEEN YEARS, FOUR MONTHS IN PRISON. AND I DON'T BELIEVE THAT I CAN COME UP WITH ANY SCHEME TO GIVE HIM ANYTHING BUT ONE OF THOSE VARIOUS SENTENCINGS. IF I WERE TO STRIKE THE STRIKE BUT NOT GRANT HIM PROBATION, HE'D STILL BE LOOKING AT, AS MR. GULLEY, I THINK, HAS MENTIONED, A MANDATORY SENTENCE OF TEN YEARS IN STATE PRISON. THERE'S NO IN BETWEEN. AND IT'S DIFFICULT TO LEARN ABOUT A PERSON AND A CASE AND THEN BE REQUIRED TO EXECUTE A SENTENCE THAT IS CALLED FOR BY OUR LAWS, BUT THEY ARE OUR LAWS.

AND MY DISCRETION IN THIS CASE STARTS WITH WHETHER OR NOT TO CONSIDER STRIKING HIS STRIKE. I'VE GIVEN THOUGHT TO THAT. THE STRIKE FOR WHICH MR. CUNNINGHAM HAS ADMITTED TO IS

OVER 20 YEARS OLD. IT WAS A ROBBERY CONVICTION. AND IT IS AN OLD CONVICTION FROM 1983. BUT OLD AS IT MAY BE, THERE HAS NOT BEEN ANY LENGTHY INTERVENING PERIOD WITHOUT ANY ADDITIONAL CRIMINAL ACTIVITY SINCE THEN.

TEN YEARS AFTER THAT CONVICTION, MR. CUNNINGHAM SIGNIFICANTLY SUFFERED A CONVICTION ONCE AGAIN, FOR BEING A FELON IN POSSESSION OF A FIREARM IN 1993. THERE ARE SEVERAL CONVICTIONS FOR DRIVING ON A SUSPENDED LICENSE. THAT'S NOT A BIG DEAL, BUT IT DOESN'T APPEAR IN HIS ENTIRE LIFE HE'S EVEN FOUND IT FIT TO COMPLY WITH THAT LAW TO EVEN GET A DRIVER'S LICENSE, SOMETHING THAT THE REST OF US HAVE TO GET, BECAUSE HE HAS CONVICTIONS OVER 20 YEARS FOR DRIVING WITHOUT A LICENSE. NOT A BIG DEAL, AND, FRANKLY, IT DOESN'T ENTER INTO THE COURT'S DECISIONMAKING PROCESS AT ALL. MISDEMEANOR BATTERY IN 1999. AND THEN THE INSTANT CASE.

SO IT'S TRUE THAT THE STRIKE PRIOR IS SOMEWHAT AGED, BUT HE'S NOT BEEN COMPLETELY LAW-ABIDING SINCE THEN. IT IS A STRIKE PRIOR OF SOME SIGNIFICANCE. THAT BEING A ROBBERY. AND THE INSTANT CASE IS A CONVICTION OF SOME SIGNIFICANCE. THIS IS NOT A THROW-AWAY FELONY, BY ANY MEANS.

SO IN CONSIDERING ALL OF THE FACTORS UNDER ROMERO THAT SHOULD ENTER INTO ONE'S DECISIONMAKING PROCESS ON WHETHER OR NOT TO STRIKE A STRIKE, I CANNOT, IN GOOD CONSCIENCE, DO SO IN THIS CASE. BOTH THE STRIKE, AS WELL AS THE INSTANT OFFENSE, ARE, IN MY OPINION, SERIOUS CRIMES OF VIOLENCE.

AND THE MOST RECENT CRIME INVOLVED THE USE OF A LOADED, ILLEGAL WEAPON AGAINST THE PERSON OF A PATHETIC, PROBABLY MENTALLY-IMPAIRED, SMALL MAN OF ADVANCED YEARS, WHO, IN

ALL LIKELIHOOD, WAS NOT THE PERSON MR. CUNNINGHAM WAS LOOKING FOR, ANYWAY. THE GUN WAS SHOVED UP AGAINST THE MAN'S NECK, HE WAS PUSHED TO THE GROUND AND HE WAS TOLD THAT HE WAS GOING TO BE SHOT AND KILLED, AND HE BELIEVED IT. AND IF ANYONE SAW HIS TESTIMONY ON THE WITNESS STAND, THEY KNOW THAT HE BELIEVED HE WAS GOING TO BE SHOT AND KILLED. HE WAS TERRIFIED. AND HE MAY NEVER RECOVER FROM THOSE FIVE MINUTES OF ANGER.

NOW, MR. CUNNINGHAM, THE TRAGIC PART, IN MY VIEW, IS NOT SO MUCH THAT YOU LOST YOUR TEMPER FOR FIVE MINUTES. I THINK THAT'S EXACTLY WHAT YOU DID. YOUR ATTORNEY SAID THAT THERE WAS FIVE MINUTES OF YOUR LIFE IN WHICH YOU COMPLETELY LOST IT. AND EVERYBODY IN THIS ROOM HAS LOST HIS OR HER TEMPER. AND WE KNOW WHAT IT'S LIKE TO LOSE ONE'S TEMPER. WHEN WE GET OLDER, WE LIKE TO THINK WE HAVE BETTER CONTROL OVER OUR TEMPER. BUT THINGS HAPPEN AND PEOPLE ARE DIFFERENT. YOU LOST YOUR TEMPER. THANK GOD YOU DIDN'T SQUEEZE THE TRIGGER AND KILL SOMEBODY. BUT TO ME, THE TRAGIC PART OF THIS IS NOT SO MUCH THAT YOU'RE GOING TO BE PUNISHED FOR LOSING YOUR TEMPER FOR FIVE MINUTES, BUT WHEN WE FURTHER EXAMINE THIS CASE, WE KNOW AT SOME POINT PRIOR TO YOU LOSING YOUR TEMPER, YOU MADE AN INFORMED, INTELLIGENT DECISION TO COME INTO POSSESSION AND OWN AND SECRETE IN YOUR HOUSE AN ILLEGAL FIREARM. AND YOU KNEW WHEN YOU TOOK POSSESSION OF THAT FIREARM THAT IT WAS ILLEGAL. THAT DIDN'T STOP YOU. AND IF YOU HAD JUST FOLLOWED THE LAW AT THE MOMENT THAT YOU TOOK POSSESSION OF THAT FIREARM, WHENEVER IT WAS YOU DECIDED TO HIDE IT IN YOUR CLOSET, IT WOULDN'T HAVE BEEN THERE FOR YOU TO ACT OUT YOUR ANGER WITH, AND YOU WOULDN'T BE SITTING HERE TODAY.

SO YOU'RE NOT JUST BEING PUNISHED FOR FIVE MINUTES

OF LOSING YOUR ANGER. YOU'RE BEING PUNISHED FOR AN ENTIRE HISTORY OF CRIMES THAT -- INCLUDING CRIMES OF VIOLENCE, FELONY CRIMES, THE SECOND CRIME OF BEING IN POSSESSION OF A FIREARM BY A FELON. AND THIS IS NOT A MINIMUM-TYPE CRIME. WHAT YOU DID, SHORT OF SHOOTING SOMEONE IN THE NECK, WAS VIOLENT. AND IT'S SOMETHING THAT I CAN'T CLOSE MY EYES TO OR TURN MY BACK ON, HOWEVER MUCH THIS MAY CHANGE YOUR LIFE FOR THE NEXT SEVERAL YEARS.

AS TO PROBATION, PROBATION IS DENIED.

THE COURT IS DECLINING TO STRIKE THE STRIKE PRIOR.

I FIND THAT ON COUNT TWO, WHICH IS THE PRINCIPAL TERM, THE CONVICTION OF 245(A)(2), ASSAULT WITH A FIREARM, THAT THE LOWER TERM OF TWO YEARS IS THE APPROPRIATE TERM.

I FIND UNDER RULE 4.408(A), THAT MR. CUNNINGHAM'S PRIOR CONVICTIONS WERE A LONG TIME AGO. AND I'LL SELECT THE LOWER TERM ON COUNT TWO. THAT TERM WILL BE DOUBLED TO FOUR YEARS BY VIRTUE OF THE STRIKE PRIOR.

AND THE PC 12022.5(A), PERSONAL USE OF A FIREARM ALLEGATION, WILL BE ADDED TO THAT FOUR-YEAR TERM FOR THREE YEARS, FOR A TOTAL OF SEVEN ON COUNT TWO.

ON COUNTS THREE AND FOUR -- ON COUNT THREE, THE COURT ADOPTS THE LOWER TERM OF 16 MONTHS, DOUBLED TO 32 MONTHS. WE'LL ORDER THAT IT BE SERVED CONCURRENTLY WITH THE SENTENCE ON COUNT TWO.

TWO YEARS, EIGHT MONTHS, CONCURRENT, ON COUNT FOUR. THE COURT ADOPTS THE LOW TERM, DOUBLES IT FOR A TERM OF 32 MONTHS, BUT WILL STAY EXECUTION OF THAT SENTENCE PER PENAL CODE SECTION 654.

THE ACT OF BEING IN POSSESSION OF A SHORT, NARROW SHOTGUN IS CHARGEABLE UNDER DIFFERENT STATUTES, AS IT WAS IN THIS CASE, BUT CAN BE PUNISHED UNDER ONLY ONE. AND IT IS BEING PUNISHED UNDER COUNT THREE, WHICH ADMITTEDLY HAS BEEN ORDERED TO SERVE CONCURRENTLY WITH COUNT TWO.

FINALLY, THE MANDATORY IMPOSITION OF AN ADDITIONAL FIVE YEARS UNDER PENAL CODE SECTION 667(A)(1), BECAUSE OF THE SERIOUS FELONY PRIOR, WILL BE IMPOSED.

AND THUS THE DEFENDANT'S NET TERM WILL BE FOUR, PLUS THREE ON COUNT TWO, PLUS FIVE ADDITIONAL ON THE PENAL CODE 667(A)(1) PRIOR, FOR A TOTAL TERM OF TWELVE YEARS.

AGAINST THAT, THE DEFENDANT WILL BE GIVEN CREDIT FOR TIME SERVED OF 178 DAYS ACTUAL, PLUS 26 DAYS GOOD TIME CREDITS.

HE'LL BE ORDERED TO PAY A STATE VICTIM'S RESTITUTION FINE IN THE SUM OF $1,000, TO BE PAID PURSUANT TO THE PENAL CODE. AND TO PAY AN ADDITIONAL RESTITUTION FINE IN THE SUM OF $1,000 TO THE STATE. AND REMAIN SO, UNLESS HIS PROBATION IS REVOKED. HE'LL BE ORDERED TO DO DNA TESTING PURSUANT TO PENAL CODE SECTION 296.

MR. CUNNINGHAM, YOU HAVE A RIGHT TO APPEAL FROM THIS SENTENCE. IF YOU WISH TO APPEAL, YOU MUST FILE A WRITTEN NOTICE OF APPEAL WITH THIS COURT WITHIN 60 DAYS OF TODAY'S DATE.

IF YOU DO APPEAL AND ARE UNABLE TO HIRE A LAWYER, THE APPELLATE COURT WILL APPOINT A LAWYER TO REPRESENT YOU ON APPEAL, FREE OF CHARGE.

YOU ALSO HAVE A RIGHT TO A FREE TRANSCRIPT AND

RECORD OF THE NECESSARY PROCEEDINGS IN THIS COURT.

YOUR WRITTEN NOTICE OF APPEAL MUST BE TIMELY FILED, WHICH IS TO SAY WITHIN 60 DAYS.

ANYTHING FURTHER, MR. LINK?

MR. LINK: NO, YOUR HONOR.

THE COURT: ANYTHING FURTHER, MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: WE'RE IN RECESS.

(THE PROCEEDINGS WERE CONCLUDED.)

* * *

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, TAMELA ERVIN, RPR, CSR NO. 9685, OFFICIAL COURT REPORTER, IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE PROCEEDINGS HAD IN THE WITHIN CASE, AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 9TH DAY OF JUNE, 2005.

TAMELA ERVIN, RPR, CSR NO. 9685
OFFICIAL COURT REPORTER

EVIDENCE MEMORANDUM

EXHIBIT

K

REPorTEr's APPEAL TRANSCRIPT VOLUME #5

Vol. 5

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

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PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,	HON. WILLIAM J. MCGRATH COURT OF APPEAL DCA NO. D046320 NO. SCE243538
VS.	
JAMES CUNNINGHAM, DEFENDANT.	PROBATION HEARING AND SENTENCING

REPORTER'S APPEAL TRANSCRIPT

WEDNESDAY, MARCH 9, 2005

VOLUME 5

PAGES 451 TO 464

APPEARANCES:

FOR PLAINTIFF: BONNIE DUMANIS
DISTRICT ATTORNEY'S OFFICE
BY: DANIEL F. LINK, ESQ.
330 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101

FOR DEFENDANT: OFFICE OF THE PUBLIC DEFENDER
BY: STACY D. GULLEY, ESQ.
250 EAST MAIN STREET, 6TH FLOOR
EL CAJON, CALIFORNIA 92020

TAMELA ERVIN, RPR, CSR NO. 9685
PRO TEM COURT REPORTER
EL CAJON, CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

EAST COUNTY DIVISION

DEPARTMENT 9 BEFORE HON. WILLIAM J. MCGRATH

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,

VS.

JAMES CUNNINGHAM, DEFENDANT.

NO. SCE243538

PROBATION HEARING AND SENTENCING

REPORTER'S TRANSCRIPT

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PRO TEM REPORTER
EL CAJON, CALIFORNIA

SAN DIEGO, CALIFORNIA; WEDNESDAY, MARCH 9, 2005; P.M. SESSION

THE COURT: WE'RE ON THE RECORD IN THE MATTER OF PEOPLE VERSUS JAMES CUNNINGHAM. CASE NUMBER SCE243538.

APPEARANCES, PLEASE.

MR. LINK: DANIEL LINK, FOR THE PEOPLE.

MR. GULLEY: STACY GULLEY, PUBLIC DEFENDER, ON BEHALF OF MR. CUNNINGHAM, WHO IS ALSO PRESENT IN COURT AND IN CUSTODY.

THE COURT: IN THIS CASE, TODAY HAS BEEN SET AS THE DATE FOR THE PROBATION HEARING AND SENTENCING.

MR. GULLEY, DOES MR. CUNNINGHAM WAIVE ARRAIGNMENT FOR JUDGEMENT AND SENTENCING?

MR. GULLEY: SO WAIVED.

THE COURT: IS THERE ANY LEGAL REASON WHY JUDGEMENT SHOULD NOT BE IMPOSED?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: I'M IN RECEIPT OF AND HAVE READ AND CONSIDERED THE FOLLOWING: A PROBATION REPORT -- AND WHO'S HERE TODAY FOR PROBATION?

PROBATION OFFICER: BETH MARDER, M-A-R-D-E-R.

THE COURT: I READ AND CONSIDERED, ON TWO DIFFERENT OCCASIONS, THE FOURTEEN-PAGE PROBATION REPORT, WHICH WAS FILED ON JANUARY 31ST. I'VE READ AND CONSIDERED, ALSO TWICE, THE LAST TIME BEING ABOUT TWO HOURS AGO, THE STATEMENT IN MITIGATION AND IN SUPPORT OF PROBATION, ALONG WITH THE ATTACHMENTS CONTAINED THEREIN OF LETTERS FROM DEFENDANT'S MOTHER, A BROTHER, I BELIEVE, AND OTHER SUPPORTERS.

EARLIER THIS AFTERNOON, I WAS HANDED ADDITIONAL

LETTERS ON BEHALF OF MR. CUNNINGHAM, WHICH I HAVE NOT HAD A CHANCE TO READ AND WHICH I WILL NOW TAKE THE TIME TO READ AND THEREFORE WILL BE, I GUESS, IN RECESS, ALTHOUGH I WON'T LEAVE THE BENCH, FOR ABOUT THREE TO FIVE MINUTES.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. THE COURT HAS ALSO NOW READ THE THREE-PAGE LETTER FROM MR. CUNNINGHAM, A LETTER DATED MARCH 2ND, FROM A ROBERT TAMBUZI, T-A-M-B-U-Z-I, WHO STATED, I BELIEVE, HE WAS A SIBLING AND HAD BEEN -- HAD SAT THROUGH THE TRIAL. THE LETTER FROM GREGORY CUNNINGHAM, A LETTER FROM ELLA ALSLEY, A-L-S-L-E-Y, A LETTER FROM SHARON WHITE AND A LETTER FROM A LA DANTE, L-A CAPITAL D-A-N-T-E, CUNNINGHAM. I'VE READ THOSE LETTERS, AS WELL AS, AS I SAID, THE PROBATION REPORT AND THE ATTACHMENTS THERETO, AS WELL AS THE STATEMENT OF MITIGATION.

I'M AWARE OF THE FACTS OF THIS CASE, HAVING PRESIDED OVER THE JURY TRIAL SOME MONTHS BACK, AND WILL BE HAPPY TO HEAR ANY ARGUMENT FROM BOTH SIDES.

FIRST, MR. GULLEY.

MR. GULLEY: THANK YOU, YOUR HONOR. FIRST, I'D LIKE TO ASK MS. ROBBINS -- SHERRY ROBBINS TO COME UP. MS. ROBBINS IS THE LADY WHO WAS GOING TO TESTIFY AT THE HEARING, BUT SHE HAD CAR PROBLEMS THAT MORNING. THE COURT ISSUED A WARRANT FOR HER ARREST. I'D ASK IF THE WARRANT CAN BE RECALLED NOW. AND MS. ROBBINS WOULD LIKE TO ADDRESS THE COURT ABOUT WHAT SHE WOULD HAVE TESTIFIED TO. A STATEMENT SHE HAD, LIKE, TO GIVE ON MR. CUNNINGHAM'S BEHALF.

THE COURT: ALL RIGHT. THE EXISTING WITNESS BENCH WARRANT FOR THE ARREST OF SHERRY ROBBINS IS RECALLED.

AND, MA'AM, IF YOU'LL STEP UP -- ACTUALLY, WHY DON'T YOU DO THIS. WHY DON'T YOU HAVE A SEAT IN THE FIRST ROW THERE, RIGHT ON THE END. RIGHT THERE. AND START BY TELLING US YOUR NAME, SPELLING YOUR LAST NAME, FOR THE RECORD.

MS. ROBBINS: MY NAME IS SHERRY ROBBINS. SHERRY, S-H-E-R-R-Y, ROBBINS, R-O-B-B-I-N-S. I'M THE SECURITY OFFICER ON THE PROPERTY THERE WHERE MR. CUNNINGHAM LIVES.

THE COURT: EVERYTHING YOU SAY HAS TO BE HEARD BY THE 30 OR SO PEOPLE IN THIS COURTROOM, AND THERE'S NO MICROPHONE. THIS COURT REPORTER HAS TO PICK UP EVERYTHING THAT YOU SAY. SO TRY TO SPEAK LOUDLY AND CLEARLY SO WE CAN ALL HEAR YOU.

MS. ROBBINS: YES, SIR.

I'M THE SECURITY OFFICER ON THE PROPERTY WHERE MR. CUNNINGHAM LIVED. I DIDN'T KNOW JAMES VERY WELL, BUT WHAT I DID KNOW WAS IF I NEEDED ANY HELP WITH ANYTHING TO SECURE THE PROPERTY, JAMES WAS THERE. AND WITH SIGNS, GATES, HELPED A LOT OF THE PEOPLE THERE. MANY TIMES I KNOW MR. CUNNINGHAM WOULD LEND MONEY TO KIDS IF THEY WERE OUT OF FOOD OR SOMETHING LIKE THAT. JAMES WAS REAL GOOD TO LEND IT -- WELL, ACTUALLY HE WOULD LEND IT. THERE WAS A TIME I KNOW HE WAS UPSET. THE MONEY HE HAD GIVEN THE RESIDENTS ABOVE WASN'T USED FOR THE CHILD. IT WAS USED FOR DRUGS. SO THERE WAS A -- I KNEW THAT HE WAS -- HE MEANT WELL.

AND, IN FACT, I WAS VERY IGNORANT TO WHAT KIND OF PROPERTY I WAS GOING INTO WHEN I STARTED THAT JOB THERE. AND THE KIDS THERE WERE NOT -- NONE OF US WERE PREPARED FOR IT. A LOT OF GANG AFFILIATES, WITH GUN SHOOTINGS. AND MY FIRST WEEK THERE, THERE WAS AN INCIDENT WITH ME AND ANOTHER MALE. AND I

WAS MAKING ROUNDS ONE NIGHT AND COME AROUND AND SEE MR. CUNNINGHAM AT THE FRONT OF THE GATE, WORKING ON HIS VEHICLE, AND I WAS TALKING TO HIM. I REALIZED HE HAD SPOKE TO SOME -- HE HAD SAID NO, LITTLE HOMEY OR NO, HOMEY. AND I REALIZED HE WAS SPEAKING TO SOMEONE JUST DIRECTLY BEHIND ME.

AND WHEN I LOOKED BACK, IT WAS THE SAME KID I HAD HAD AN ARGUMENT OR PUT OFF MY PROPERTY THAT NIGHT WHO HAD THREATENED TO SHOOT ME. SO I DON'T KNOW, BUT I THINK MR. CUNNINGHAM HELPED ME NOT BE PHYSICALLY ASSAULTED THAT NIGHT. AND BECAUSE THESE BOYS THINK THEY -- I'M PRETTY SURE THEY ALL HAVE AN UNDERSTANDING FOR EACH OTHER AND THEY LISTEN TO HIM. I KNOW THERE WAS RESPECT FOR HIM FROM A LOT OF KIDS ON THE PROPERTY, WHETHER THEY WERE GANG-AFFILIATED OR KIDS THAT JUST LIVED ON THE PROPERTY.

SO THAT'S PRETTY MUCH ALL I CAN TESTIFY TO BECAUSE I NEVER HAD A PROBLEM WITH MR. CUNNINGHAM. HE WAS VERY HELPFUL WITH ANYTHING I NEEDED ON THE PROPERTY, NEVER SHOWED ANY DISRESPECT. AND APOLOGIZED IF HE WAS BEING TOO LOUD. AND I NEVER HAD TO ASK HIM TO GO IN AFTER CURFEW. I WAS ACTUALLY QUITE SURPRISED BY ALL THIS. MY OPINION OF HIM AND WHAT I HAD TO DEAL WITH HIM. I NEVER HAD A PROBLEM WITH HIM.

THE COURT: MS. ROBBINS, THANK YOU FOR YOUR COMMENTS. YOU'RE EXCUSED AT THIS POINT. I'LL JUST TELL YOU PRIOR TO YOUR LEAVING THAT THE NEXT TIME YOU GET A COURT SUBPOENA, TO APPEAR IN COURT. YOU RUN THE RISK OF GETTING ARRESTED, IF YOU HAVE A CAR BREAK DOWN AND YOU CAN'T MAKE IT AND DON'T CALL ANYBODY OR TELL ANYBODY ABOUT IT.

MS. ROBBINS: I UNDERSTAND. I DIDN'T REALIZE IT WAS A

SUBPOENA, EITHER.

THE COURT: THANK YOU. YOU'RE EXCUSED.

MR. GULLEY: THANK YOU.

THE COURT: MR. GULLEY.

MR. GULLEY: YES, YOUR HONOR. THE QUESTION NOW, YOUR HONOR, IS HOW'S MR. CUNNINGHAM, BASED ON THE JURY'S FINDINGS, GOING TO BE PUNISHED? DOES THE COURT PUNISH HIM -- IF THE COURT IMPOSES TEN YEARS, FOURTEEN YEARS RECOMMENDED BY PROBATION, IS THAT SEVERE PUNISHMENT FOR WHAT HAPPENED IN THIS CASE? AND I SUBMIT TO THE COURT IT IS. AND I'M SURE THE PEOPLE WILL SAY TO GIVE HIM PROBATION IS UNDERPUNISHMENT. SO THE COURT HAS A DIFFICULT CALL TO MAKE.

BASED ON THE LETTERS, BASED ON MY STATEMENT OF MITIGATION, WHICH I WON'T REPEAT IN DETAIL, BASED ON WHAT THIS COURT HAS SEEN IN TRIAL, I THINK THE BIGGEST TRAGEDY COULD BE SENDING HIM TO PRISON FOR THAT PERIOD OF TIME.

IF THE COURT'S HANDS WEREN'T TIED, I WOULD THINK APPROPRIATE PUNISHMENT WOULD BE TWO OR THREE YEARS IN STATE PRISON. AND THAT'S BASED ON MY EXPERIENCE OF DOING CRIMINAL LAW FOR 20 YEARS. FOURTEEN YEARS, TEN YEARS IS WAY TOO MUCH TIME FOR WHAT HAPPENED IN THIS CASE, CONSIDERING NO ONE WAS HURT. NOT PHYSICALLY. NOT MENTALLY. THIS WAS SOMETHING THAT FIVE MINUTES OF MR. CUNNINGHAM'S LIFE GOT OUT OF CONTROL AND HE MADE A BAD DECISION. FOURTEEN YEARS IS NOT AN APPROPRIATE SENTENCE FOR FIVE MINUTES OF BAD DECISION, WHEN NO ONE IS HURT.

NOW, IF SOMEBODY GOT HURT, SHOT, KILLED, THEN THERE'S NO ARGUMENT ON THAT POINT. BUT HERE WE HAVE A GUY WHO, FOR THE LAST TEN YEARS, HAS BEEN LAW-ABIDING, EXCEPT FOR SOME

MINOR TRAFFIC STUFF, WHO'S BEEN WORKING, WHO'S BEEN RAISING A DAUGHTER, WHO HAS STRONG FAMILY SUPPORT, WHO'S BEEN TRYING TO DO ALL THE RIGHT THINGS. THE MAIN MISTAKE HE MADE WAS TAKING THE LAW INTO HIS OWN HANDS. AND FOR THAT FIVE-TO-TEN-MINUTE PERIOD OF TIME, HE WAS WRONG. BUT IT DOES NOT JUSTIFY FOURTEEN YEARS IN STATE PRISON OR EVEN TEN YEARS IN STATE PRISON.

I'M ASKING THE COURT TO TAKE A BOLD MOVE. I'M ASKING THE COURT TO GRANT HIM PROBATION ON THIS CASE. THEREFORE, ALL THE OTHER STUFF WON'T KICK IN. I'M ASKING THE COURT TO STRIKE THE STRIKE. GRANT HIM PROBATION. STAY TEN YEARS, IF THAT'S WHAT THE COURT WISHES TO DO.

IF THE COURT NEEDS ANY OTHER INPUT, THEN THE SECOND ALTERNATIVE I WOULD GIVE TO THE COURT IS TO SEND HIM UP ON 1203 EVALUATION. LET THEM LOOK AT HIM. LET THEM SEE WHAT TYPE OF GUY HE IS. AND THEN HAVE THEIR INPUT FOR SENTENCING.

THE COURT: ALL RIGHT. THANK YOU.

MR. LINK.

MR. LINK: YES, YOUR HONOR. AS YOUR HONOR KNOWS, THE DEFENDANT IS INELIGIBLE FOR PROBATION. THERE DON'T APPEAR TO BE ANY CIRCUMSTANCES IN THIS CASE THAT ARE OVERLY MITIGATED.

LOOKING AT THE DEFENSE BRIEF THAT WAS FILED, NONE OF THE SIX CIRCUMSTANCES OF MITIGATION ARE ANYWHERE CLOSE TO CONVINCING.

THE DEFENDANT'S PERFORMANCE ON PROBATION. HE VIOLATED PROBATION, JUST BASED ON THE REPORT FILED BY THE PROBATION OFFICE, A MULTIPLE OF SEVEN OR EIGHT TIMES. MOSTLY COMMITTED FOR CREATING 14601 VIOLATIONS.

SOME PEOPLE WOULD CONSIDER HIS CRIMINAL -- IT'S NOT

INSIGNIFICANT. THERE IS A CRIMINAL RECORD THERE, OBVIOUSLY, WITH A STRIKE. STARTING BACK IN '76. AND HE HAS SHOWN A PATTERN OF VIOLENCE. HE HAD -- WHICH WAS INITIALLY STARTED OUT WITH ASSAULT WITH A DEADLY WEAPON OF A POLICE OFFICER 29 YEARS AGO. PLEADING TO A PC69. AND NOT TOO LONG AFTER '80, WE SEE MORE VIOLENCE, WITH BATTERY. AND THEN '83, HE HAS A STRIKE. THE ROBBERY. THERE'S A HIT AND RUN IN '93. TEN YEARS LATER. THERE'S FELON IN POSSESSION OF FIREARM IN 1993.

UNFORTUNATELY, THERE'S RARELY -- HE CONTINUES TO SHOW A PATTERN OF CRIMINAL CONDUCT, SOME OF WHICH IS VIOLENT.

SO TAKING A BOLD STEP AND GRANTING THIS DEFENDANT PROBATION IS JUST NOT APPROPRIATE, NOR IS GIVING HIM A DIAGNOSTIC EVALUATION FOR THREE MONTHS.

THE DEFENDANT, BECAUSE OF THE CRIMES HE'S COMMITTED OVER THE LAST 29 YEARS, IS WELL AWARE THAT HE SHOULD NOT -- NO MATTER WHAT THE CIRCUMSTANCES HE'S LIVING IN, SHOULD NOT HAVE GUNS IN HIS HOUSE, NOR SHOULD HE BE ARMING HIMSELF AND ASSAULTING PEOPLE WITH THEM. THAT CAN'T BE FORGOTTEN, EITHER, YOUR HONOR. THIS -- WE'RE DEALING WITH A GUN. AND AS YOUR HONOR KNOWS, LAWS GET VERY HARSH AS SOON AS GUNS GET INVOLVED. AND THERE'S GOOD REASON FOR THAT. THERE'S NO REASON THIS DEFENDANT SHOULD BE ANYWHERE NEAR A GUN, LET ALONE POSSESSING THREE OF THEM, TWO OF WHICH WAS MODIFIED AND ONE WHICH WAS USED -- PLACED TO THE NECK OF A FAIRLY HELPLESS VICTIM.

I THINK THAT THE PROBATION RECOMMENDATION IS APPROPRIATE.

THE COURT: ANYTHING FURTHER, MR. GULLEY?

MR. GULLEY: AGAIN, YOUR HONOR, I UNDERSTAND WHAT THE

PEOPLE ARE SAYING. OKAY. MAYBE PROBATION MAY BE AN UNDERPUNISHMENT, BUT I HAVEN'T SEEN ANYTHING THE PEOPLE HAVE SHOWN IN THIS CASE WHERE TEN YEARS, FOURTEEN YEARS IS AN APPROPRIATE PUNISHMENT.

AND, AGAIN, THE QUESTION IS: DO YOU PUNISH HIM TOO HARD BASED UPON THE FACTS OF THIS CASE, OR DO YOU PUNISH HIM -- HE HAS SHOWN STINTS IN HIS LIFE WHERE HE CAN BE AN EXCELLENT CITIZEN. TEN YEARS SINCE HIS LAST FELONY, TEN YEARS BEFORE THAT -- BEFORE HIS ROBBERY. HE HAS FAMILY SUPPORT. I DON'T KNOW HOW MUCH MORE WE CAN ASK OF A PERSON. PEOPLE MAKE MISTAKES. HE MADE A BIG ONE. THE QUESTION IS: IS THAT MISTAKE WORTH TEN YEARS? I SUGGEST IT'S NOT.

I BELIEVE HIS MOTHER WOULD LIKE TO ADDRESS THE COURT.

THE COURT: I'LL HEAR FROM HIS MOTHER BRIEFLY. HIS MOTHER DID WRITE ME A LETTER, WHICH I DID READ. AND IF YOU HAVE ANYTHING FURTHER YOU WOULD LIKE TO SAY, YOU CAN STEP FORWARD.

DEFENDANT'S MOTHER: I WOULD JUST LIKE TO SAY I FEEL THAT JAMES SHOULD BE GIVEN A CHANCE. HE HAS TWO CHILDREN. ONE 11. AND SHE DOESN'T KNOW WHERE HE IS. SHE THINKS HE'S WORKING OUT OF TOWN. SHE THINKS HE'S WORKING OUT OF TOWN. AND I KNOW I'M GOING TO HAVE TO TELL HER THE OUTCOME OF TODAY, BUT I'M JUST ASKING YOU TO GIVE HIM LENIENCY BECAUSE I'M 65, WITH POOR HEALTH. AND IF HE'S GONE FOR FOURTEEN YEARS, I MAY NEVER SEE HIM AGAIN. THANK YOU.

THE COURT: IS THERE A CUSTODY UPDATE FROM PROBATION?

PROBATION OFFICER: YES, THERE IS, YOUR HONOR.

178, 26 CREDITS, 204 TOTAL.

THE COURT: YOU KNOW, I'M SORRY. I ASKED FOR THAT INFORMATION, BUT THEN I WAS NOT PREPARED TO RECEIVE IT.

ONE MORE TIME, PLEASE.

PROBATION OFFICER: 178, 26 CREDIT, 204 TOTAL.

THE COURT: THANK YOU.

THIS CASE IS A VERY POIGNANT EXAMPLE OF THE DIFFICULTY THAT WE JUDGES FACE WHEN THE PEOPLE AND THE LEGISLATURE DECIDE THAT CERTAIN SENTENCES SHOULD BE MANDATORY AND SHOULD APPLY TO ALL PEOPLE UNDER CERTAIN CIRCUMSTANCES. EVERY CASE IS DIFFERENT. EVERY PERSON IS DIFFERENT. AND IT IS DECEPTIVELY EASY FOR THE PEOPLE WHO MAKE OUR LAWS TO BELIEVE THAT THE ONE-SIZE-FITS-ALL SENTENCING SCHEME AND/OR MANDATORY SENTENCES FOR CERTAIN CRIMES UNDER CERTAIN CIRCUMSTANCES SHOULD BE THE LAW OF THE LAND.

MR. CUNNINGHAM'S SITUATION IS, ACCORDING TO THE LAW, TO EITHER RECEIVE PROBATION WITH LOCAL JAIL TIME, TO RECEIVE TEN YEARS IN PRISON, TWELVE YEARS IN PRISON OR FOURTEEN YEARS, FOUR MONTHS IN PRISON. AND I DON'T BELIEVE THAT I CAN COME UP WITH ANY SCHEME TO GIVE HIM ANYTHING BUT ONE OF THOSE VARIOUS SENTENCINGS. IF I WERE TO STRIKE THE STRIKE BUT NOT GRANT HIM PROBATION, HE'D STILL BE LOOKING AT, AS MR. GULLEY, I THINK, HAS MENTIONED, A MANDATORY SENTENCE OF TEN YEARS IN STATE PRISON. THERE'S NO IN BETWEEN. AND IT'S DIFFICULT TO LEARN ABOUT A PERSON AND A CASE AND THEN BE REQUIRED TO EXECUTE A SENTENCE THAT IS CALLED FOR BY OUR LAWS, BUT THEY ARE OUR LAWS.

AND MY DISCRETION IN THIS CASE STARTS WITH WHETHER OR NOT TO CONSIDER STRIKING HIS STRIKE. I'VE GIVEN THOUGHT TO THAT. THE STRIKE FOR WHICH MR. CUNNINGHAM HAS ADMITTED TO IS

OVER 20 YEARS OLD. IT WAS A ROBBERY CONVICTION. AND IT IS AN OLD CONVICTION FROM 1983. BUT OLD AS IT MAY BE, THERE HAS NOT BEEN ANY LENGTHY INTERVENING PERIOD WITHOUT ANY ADDITIONAL CRIMINAL ACTIVITY SINCE THEN.

TEN YEARS AFTER THAT CONVICTION, MR. CUNNINGHAM SIGNIFICANTLY SUFFERED A CONVICTION ONCE AGAIN, FOR BEING A FELON IN POSSESSION OF A FIREARM IN 1993. THERE ARE SEVERAL CONVICTIONS FOR DRIVING ON A SUSPENDED LICENSE. THAT'S NOT A BIG DEAL, BUT IT DOESN'T APPEAR IN HIS ENTIRE LIFE HE'S EVEN FOUND IT FIT TO COMPLY WITH THAT LAW TO EVEN GET A DRIVER'S LICENSE, SOMETHING THAT THE REST OF US HAVE TO GET, BECAUSE HE HAS CONVICTIONS OVER 20 YEARS FOR DRIVING WITHOUT A LICENSE. NOT A BIG DEAL, AND, FRANKLY, IT DOESN'T ENTER INTO THE COURT'S DECISIONMAKING PROCESS AT ALL. MISDEMEANOR BATTERY IN 1999. AND THEN THE INSTANT CASE.

SO IT'S TRUE THAT THE STRIKE PRIOR IS SOMEWHAT AGED, BUT HE'S NOT BEEN COMPLETELY LAW-ABIDING SINCE THEN. IT IS A STRIKE PRIOR OF SOME SIGNIFICANCE. THAT BEING A ROBBERY. AND THE INSTANT CASE IS A CONVICTION OF SOME SIGNIFICANCE. THIS IS NOT A THROW-AWAY FELONY, BY ANY MEANS.

SO IN CONSIDERING ALL OF THE FACTORS UNDER ROMERO THAT SHOULD ENTER INTO ONE'S DECISIONMAKING PROCESS ON WHETHER OR NOT TO STRIKE A STRIKE, I CANNOT, IN GOOD CONSCIENCE, DO SO IN THIS CASE. BOTH THE STRIKE, AS WELL AS THE INSTANT OFFENSE, ARE, IN MY OPINION, SERIOUS CRIMES OF VIOLENCE.

AND THE MOST RECENT CRIME INVOLVED THE USE OF A LOADED, ILLEGAL WEAPON AGAINST THE PERSON OF A PATHETIC, PROBABLY MENTALLY-IMPAIRED, SMALL MAN OF ADVANCED YEARS, WHO, IN

ALL LIKELIHOOD, WAS NOT THE PERSON MR. CUNNINGHAM WAS LOOKING FOR, ANYWAY. THE GUN WAS SHOVED UP AGAINST THE MAN'S NECK, HE WAS PUSHED TO THE GROUND AND HE WAS TOLD THAT HE WAS GOING TO BE SHOT AND KILLED, AND HE BELIEVED IT. AND IF ANYONE SAW HIS TESTIMONY ON THE WITNESS STAND, THEY KNOW THAT HE BELIEVED HE WAS GOING TO BE SHOT AND KILLED. HE WAS TERRIFIED. AND HE MAY NEVER RECOVER FROM THOSE FIVE MINUTES OF ANGER.

NOW, MR. CUNNINGHAM, THE TRAGIC PART, IN MY VIEW, IS NOT SO MUCH THAT YOU LOST YOUR TEMPER FOR FIVE MINUTES. I THINK THAT'S EXACTLY WHAT YOU DID. YOUR ATTORNEY SAID THAT THERE WAS FIVE MINUTES OF YOUR LIFE IN WHICH YOU COMPLETELY LOST IT. AND EVERYBODY IN THIS ROOM HAS LOST HIS OR HER TEMPER. AND WE KNOW WHAT IT'S LIKE TO LOSE ONE'S TEMPER. WHEN WE GET OLDER, WE LIKE TO THINK WE HAVE BETTER CONTROL OVER OUR TEMPER. BUT THINGS HAPPEN AND PEOPLE ARE DIFFERENT. YOU LOST YOUR TEMPER. THANK GOD YOU DIDN'T SQUEEZE THE TRIGGER AND KILL SOMEBODY. BUT TO ME, THE TRAGIC PART OF THIS IS NOT SO MUCH THAT YOU'RE GOING TO BE PUNISHED FOR LOSING YOUR TEMPER FOR FIVE MINUTES, BUT WHEN WE FURTHER EXAMINE THIS CASE, WE KNOW AT SOME POINT PRIOR TO YOU LOSING YOUR TEMPER, YOU MADE AN INFORMED, INTELLIGENT DECISION TO COME INTO POSSESSION AND OWN AND SECRETE IN YOUR HOUSE AN ILLEGAL FIREARM. AND YOU KNEW WHEN YOU TOOK POSSESSION OF THAT FIREARM THAT IT WAS ILLEGAL. THAT DIDN'T STOP YOU. AND IF YOU HAD JUST FOLLOWED THE LAW AT THE MOMENT THAT YOU TOOK POSSESSION OF THAT FIREARM, WHENEVER IT WAS YOU DECIDED TO HIDE IT IN YOUR CLOSET, IT WOULDN'T HAVE BEEN THERE FOR YOU TO ACT OUT YOUR ANGER WITH, AND YOU WOULDN'T BE SITTING HERE TODAY.

SO YOU'RE NOT JUST BEING PUNISHED FOR FIVE MINUTES

OF LOSING YOUR ANGER. YOU'RE BEING PUNISHED FOR AN ENTIRE HISTORY OF CRIMES THAT -- INCLUDING CRIMES OF VIOLENCE, FELONY CRIMES, THE SECOND CRIME OF BEING IN POSSESSION OF A FIREARM BY A FELON. AND THIS IS NOT A MINIMUM-TYPE CRIME. WHAT YOU DID, SHORT OF SHOOTING SOMEONE IN THE NECK, WAS VIOLENT. AND IT'S SOMETHING THAT I CAN'T CLOSE MY EYES TO OR TURN MY BACK ON, HOWEVER MUCH THIS MAY CHANGE YOUR LIFE FOR THE NEXT SEVERAL YEARS.

AS TO PROBATION, PROBATION IS DENIED.

THE COURT IS DECLINING TO STRIKE THE STRIKE PRIOR.

I FIND THAT ON COUNT TWO, WHICH IS THE PRINCIPAL TERM, THE CONVICTION OF 245(A)(2), ASSAULT WITH A FIREARM, THAT THE LOWER TERM OF TWO YEARS IS THE APPROPRIATE TERM.

I FIND UNDER RULE 4.408(A), THAT MR. CUNNINGHAM'S PRIOR CONVICTIONS WERE A LONG TIME AGO. AND I'LL SELECT THE LOWER TERM ON COUNT TWO. THAT TERM WILL BE DOUBLED TO FOUR YEARS BY VIRTUE OF THE STRIKE PRIOR.

AND THE PC 12022.5(A), PERSONAL USE OF A FIREARM ALLEGATION, WILL BE ADDED TO THAT FOUR-YEAR TERM FOR THREE YEARS, FOR A TOTAL OF SEVEN ON COUNT TWO.

ON COUNTS THREE AND FOUR -- ON COUNT THREE, THE COURT ADOPTS THE LOWER TERM OF 16 MONTHS, DOUBLED TO 32 MONTHS. WE'LL ORDER THAT IT BE SERVED CONCURRENTLY WITH THE SENTENCE ON COUNT TWO.

TWO YEARS, EIGHT MONTHS, CONCURRENT, ON COUNT FOUR. THE COURT ADOPTS THE LOW TERM, DOUBLES IT FOR A TERM OF 32 MONTHS, BUT WILL STAY EXECUTION OF THAT SENTENCE PER PENAL CODE SECTION 654.

THE ACT OF BEING IN POSSESSION OF A SHORT, NARROW SHOTGUN IS CHARGEABLE UNDER DIFFERENT STATUTES, AS IT WAS IN THIS CASE, BUT CAN BE PUNISHED UNDER ONLY ONE. AND IT IS BEING PUNISHED UNDER COUNT THREE, WHICH ADMITTEDLY HAS BEEN ORDERED TO SERVE CONCURRENTLY WITH COUNT TWO.

FINALLY, THE MANDATORY IMPOSITION OF AN ADDITIONAL FIVE YEARS UNDER PENAL CODE SECTION 667(A)(1), BECAUSE OF THE SERIOUS FELONY PRIOR, WILL BE IMPOSED.

AND THUS THE DEFENDANT'S NET TERM WILL BE FOUR, PLUS THREE ON COUNT TWO, PLUS FIVE ADDITIONAL ON THE PENAL CODE 667(A)(1) PRIOR, FOR A TOTAL TERM OF TWELVE YEARS.

AGAINST THAT, THE DEFENDANT WILL BE GIVEN CREDIT FOR TIME SERVED OF 178 DAYS ACTUAL, PLUS 26 DAYS GOOD TIME CREDITS.

HE'LL BE ORDERED TO PAY A STATE VICTIM'S RESTITUTION FINE IN THE SUM OF $1,000, TO BE PAID PURSUANT TO THE PENAL CODE. AND TO PAY AN ADDITIONAL RESTITUTION FINE IN THE SUM OF $1,000 TO THE STATE. AND REMAIN SO, UNLESS HIS PROBATION IS REVOKED. HE'LL BE ORDERED TO DO DNA TESTING PURSUANT TO PENAL CODE SECTION 296.

MR. CUNNINGHAM, YOU HAVE A RIGHT TO APPEAL FROM THIS SENTENCE. IF YOU WISH TO APPEAL, YOU MUST FILE A WRITTEN NOTICE OF APPEAL WITH THIS COURT WITHIN 60 DAYS OF TODAY'S DATE.

IF YOU DO APPEAL AND ARE UNABLE TO HIRE A LAWYER, THE APPELLATE COURT WILL APPOINT A LAWYER TO REPRESENT YOU ON APPEAL, FREE OF CHARGE.

YOU ALSO HAVE A RIGHT TO A FREE TRANSCRIPT AND

RECORD OF THE NECESSARY PROCEEDINGS IN THIS COURT.

YOUR WRITTEN NOTICE OF APPEAL MUST BE TIMELY FILED, WHICH IS TO SAY WITHIN 60 DAYS.

ANYTHING FURTHER, MR. LINK?

MR. LINK: NO, YOUR HONOR.

THE COURT: ANYTHING FURTHER, MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: WE'RE IN RECESS.

(THE PROCEEDINGS WERE CONCLUDED.)

* * *

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, TAMELA ERVIN, RPR, CSR NO. 9685, OFFICIAL COURT REPORTER, IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE PROCEEDINGS HAD IN THE WITHIN CASE, AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 9TH DAY OF JUNE, 2005.

TAMELA ERVIN, RPR, CSR NO. 9685
OFFICIAL COURT REPORTER

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO, EAST COUNTY DIVISION

DEPARTMENT 9 BEFORE HON. WILLIAM J. MCGRATH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JAMES CUNNINGHAM, DEFENDANT.	CASE NO. SCE243538 **MASTER INDEX**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JANUARY 4, 5, 6, 2005

APPEARANCES:

FOR THE PLAINTIFF: DAN LINK
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: STACY GULLEY
DEPUTY PUBLIC DEFENDER

REPORTED BY: IRENE PERKINS, CSR NO. 12727
SAN DIEGO SUPERIOR COURT

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CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAMES CUNNINGHAM

CASE NO. SCE243538

JANUARY 4, 5, 6, 10, 2005
MARCH 9, 2005

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I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 13TH DAY OF MAY, 2005.

Irene Perkins

IRENE PERKINS, CSR 12727
OFFICIAL COURT REPORTER

POLICE INTERVIEW

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interview; SEE in R.T. Pg 14:1,28...)
Testimoney to officer Zmitewski
They were sitting in front room. The door to the apartment was open. At this time Mr. Cunningham entered the apartment through the open door and he had a shot gun in his hand.

Counsel: fell to refer to reporter's transcripts of busting through the door. (SEE in R.T. Pg. 14:1,8...)

Rebbeca Knox: Police report says at one point he took the shot gun she said, and put it to Castro's neck and pushed him with it about five feet pinning him against the wall (SEE in R.T. Pg. 13:20,28...). She was sitting in the room with her roomate Castro. different from trial Testimoney.

Rebbeca Knox and Christopher Knox testimoney were different from each others (SEE in R.T. Page. 14:16, 19...)

R. Knox: Testimoney she was sitting in the room with her roomate (SEE in R.T. Pg. 13:26). Her and Castro where sitting in the front room. The door to the apartment was opened. At this time Mr. Cunningham entered the apartment through the open door and he had a shot gun.

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Dept. #12

Officer Paz testimoney

Sept. 28th 2004 El cajon California: Case SCE 243538

reporter's Transcript of Proceeding;

Paz: testimoney: to how fast Petitioner was going (see R.T. Pg. 8: 1, 28...,)

Paz: testimoney: Petitioner stop three seconds After (flight instructions)
(see in R.T. Pg. 9: 1, 28...,) R.T. Pa.

Paz: That's a saw-off shot Gun It (was sawed off!) The shot Gun was
Manufature as is see in R.T. Exhibit Pg. 10: 1, 28...,

Paz: Fell to go back to the scene of the crime, and interview witnesses.
(see in R.T. Pg. 6: 19, 21...;)

Paz: Paz arrivel at scene 22:58 First got the call. Paz testimoney and
where about You can't see the scene of the supposeut crime
from freeway introce, Not Visual The complex is more then
2,000 feet from freeway introce (see in R.T. Pg 7: 19, 28...,)

Paz: Testimoney how far Petitioner may (when) off too rule out guilty by fight.
(see in R.T. Pg. *9: 14, 20) (R.T. Pg 10: 1, 12

3 of 6

Designated investigating officer

Officer Chase EXIbIt # Dept Ment # 12

Reporter's Transcript of Proceeding
Sept. 28th 2004

chase: Testimoney about a Potential assault!

Time defference from officer Paz.

chase Time about (10:15) both swore the dispather's time. Paz time (22:58). Chase time (10:15) 45 or 50 Minute time difference. Counsel- And Appellant should of rasie this under (due Process.) see in R.T. Pg. 12: 12, 23

Chase: interview (see in R.T. Pg. 13: 20, 28...,) Dept. 12

NINA TALAVERA

Reporter's Transcipt of Proceeding

NO. 46320
CASE. SCE 245538

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NINA TALAVERA TESTIMONEY SEE IN R.T. Pg 18:1,28) the Loud shooting of the Knox's theating to shoot Petitioner in the face.

When Petitioner came back: (SEE in R.T. Pg. 17:1,20...) (Castro's TestimoneY.)
I, believe he said about a couple hours Later Mr. Cunningham came back into the apartment through the open door with the shot Gun and Pointed it at him and said he was going to kill him if he didn't get his cell Phone back (Should of been raised at trial).

C

Police interview: He stated that the roomate chris Knox came out of the bedroom and told Cunningham to LEAVE. Cunningham Left Pointing the shot Gun SAYS He finally Left.

Dept. *12

Reporter's Transcript's of Proceeding

Do. 46320

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CASE. SCE 243538

(Officer Chase)

Mr. Gulley: (R.T. Pg. 1: 17...) Motion to exclude.

Chris Knox: He was Known for his Violent Temper an threats (SEE in R.T. Pg. 40; 20-28...).

chris Knox: He was one of the Persons on the 911 call he was question! by officer ZMITEWSKI Night of the incident, But No subpenae. SEE R.T. Pg. 14: 20, 28...) Chris Knox was in his home at the time an made the 911 Call - him and Rebbeca (To be refuted).

C. Knox: Testimoney (SEE in R.T. Pg. 15: 18, 28...) C. Knox Said, That he had been in (Petitioner) the apartment Earlier and Petitioner was Yelling at Castro about the cell Phone. That he believed he had taken.
at on Point Mr Cunningham Left and He returned a while Later.
At this time chris Knox was in his bedroom. He heard some kind of commotion, His wife Rebbeca called for him he came out into the living room and saw Mr. Cunningham - Petitioner with the shot-Gun.

C. Knox: His Police report statement; when he came out of the room "Petitioner had Casto by the neck and was pointing the shot Gun in his face" and he was threating to kill everyone in the apartment. (SEE in R.T. Pg. 16; 1, 3...)

C. Knox Police report (SEE in R.T. Pg. 16; 6, 9...) No one gave him Permisson to Enter the apartment (SEE in R.T. Pg 16; 23, 28...)

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RePorter Transcripts of Proceedings (Officer Chase)

No. 46320
Case SCE2435

Officer Paz testify he recieved the Possible assult time 10:58
Counsel: Should of address the different dispatch Time.
Petitioner: show no flight Pattern when officer stop him he deposed of the shot Gun. So not to be shot.

Counsel: Didn't challege speed Paz testified too (SEE IN R.T. Pg. 3; 1, 28...). Siren turn the lights green. Again if Counsel would of investigated supposent crime scene from point of so call attack. Officer Paz would of had to explain Left hand turns from inter section.

flight ineffective Counsel

Counsel: Didn't return to the scene of where Petitioner was stop by Officer Paz. due Process (SEE IN R.T. Pg. 5; 1, 28....).

Officer Paz: Paz is not a gun expert so for Him to call a official Police issue (shot Gun) a savage-shot Gun was Misleading unproffessional he's no a expert. The Proper name is steved - ("Model 820-B")